

No. 91-1158-CFX Title: Mississippi, et al., Petitioners
Status: GRANTED v.
 Louisiana, et al.

Docketed: Court: United States Court of Appeals for
January 16, 1992 the Fifth Circuit

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Entry	Date	Note	Proceedings and Orders
1	Jan 16 1992	G	Petition for writ of certiorari filed.
2	Jan 16 1992		Appendix of petitioner filed.
4	Feb 14 1992		Brief of respondents Louisiana, et al. in opposition filed.
3	Feb 19 1992		DISTRIBUTED. March 6, 1992
6	Mar 3 1992	X	Reply brief of petitioner Mississippi, et al. filed.
8	Mar 10 1992		Record requested.
9	Mar 12 1992		Record filed.
		*	Proceedings from USCA/5. (2 boxes - Box 1 contains Vols 1-10; Box 2 contains Vols 11 & 12)
10	Mar 16 1992		REDISTRIBUTED. March 20, 1992
11	Mar 23 1992		Petition GRANTED. limited to Questions 1 and 2 presented by the petition and to the following question: Did the district court properly assert jurisdiction over respondent's third-party compliant against petitioner State of Mississippi? *****
13	Apr 24 1992		Order extending time to file brief of petitioner on the merits until May 19, 1992.
14	May 19 1992		Brief of petitioners Mississippi, et al. filed.
15	May 19 1992		Joint appendix filed.
		*	Joint appendix in two volumes.
17	Jun 18 1992		Order extending time to file brief of respondent on the merits until July 9, 1992.
18	Jul 10 1992		Order further extending time to file brief of respondent on the merits until July 17, 1992.
19	Jul 17 1992		Brief of respondents Louisiana, et al. filed.
20	Aug 11 1992		CIRCULATED.
21	Aug 13 1992	G	Application (A92-129) extension of time to file reply brief on the merits, submitted to Justice Scalia.
22	Aug 17 1992		Application (A92-129) granted by Justice Scalia extending the time to file until September 1, 1992.
23	Aug 21 1992		SET FOR ARGUMENT MONDAY, NOVEMBER 9, 1992. (3RD CASE).
24	Aug 31 1992	X	Reply brief of petitioners Mississippi, et al. filed.
25	Nov 9 1992		ARGUED

1-1158

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,
Respondents.

**Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in determining the boundary between the States of Mississippi and Louisiana.
2. Whether the court below exceeded its authority under Rule 52(a) in disregarding findings of fact by the trial court as "clearly erroneous."
3. Whether the court below had jurisdiction to determine this controversy.

PARTIES TO THE PROCEEDING BELOW

The State of Mississippi

Julia Donelson Houston (now Ehrhardt), Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased

Ruth Houston Baker, Individually

The State of Louisiana

The Lake Providence Port Commission

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THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,
Respondents.

— ♦ —
**Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit**
— ♦ —

PETITION FOR WRIT OF CERTIORARI
— ♦ —

The State of Mississippi ("Mississippi"), Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased, and Ruth Houston Baker, Individually ("the Houston group"), seek review of the Decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit" or "court below") reversing and rendering the Judgment of the United States District Court for the Southern District of Mississippi ("Mississippi District Court") that determined the boundary of the States of Mississippi and Louisiana to lie west of an island in the Mississippi River known as Stack Island or Island No. 94 ("Stack Island").

Respondents are the State of Louisiana ("Louisiana") and the Lake Providence Port Commission ("Port Commission").

OPINIONS BELOW

The opinion of the court below is reported as *Houston, et al. v. Thomas, et al.*, 937 F.2d 247 (5th Cir. 1991), and is reproduced in the Appendix to this Petition. App. at 1a.

JURISDICTION

The Judgment of the court below was entered on August 5, 1991. App. at 1a. Rehearing was denied on October 22, 1991. App. at 16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). App. at 18a.

STATUTE INVOLVED

The principal statutory provision involved is 28 U.S.C. § 1251(a) (1988). It states: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

STATEMENT OF THE CASE

This case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the Mississippi River, together with the rights

of individual owners claiming title under patent from the United States and a deed from the State of Mississippi.

The island involved, known as "Stack Island" or "Island No. 94," has been known to exist, or appears from evidence in this cause to have existed, since the 1826-1827 era. The individual claimants, the Houston group, claim under a patent from the United States issued to Stephen B. Blackwell in 1888, effective 1881, as well as a deed from the State of Mississippi issued in 1933 following a tax foreclosure.

This case was originally brought by the Houston group in the Mississippi District Court to quiet title. The State of Louisiana and the Lake Providence Port Commission intervened, seeking a determination that Stack Island was located within the boundary of Louisiana.¹ Thereafter, Louisiana sought to have this Court assume original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a) (1988). *Louisiana v. Mississippi*, No. 114, October Term 1988. It maintained that "the states are the real parties at interest" (La. Brief in Support of Pet. for Reh. at 8; App. at 95a) and that this Court was "the only forum to settle this dispute, fix the boundary line between the States and determine finally the rights of the parties." (La. Br. in Support of Motion at 16; App. at 84a) Louisiana further asserted that, as a boundary dispute, the issue was "subject to the exclusive jurisdiction of [this Court]" (La. Motion for

¹ No question with respect to the Mississippi District Court having jurisdiction was raised by Louisiana in its Petition to Intervene in that court.

Leave to File Complaint at 1; App. at 80a) and that "[this Court] alone has the power to fix and determine the boundary lines herein described." (La. Pet. for Reh. at 2; App. at 95a)

Mississippi, together with the Houston group, urged this Court not to take jurisdiction on the grounds that an alternative forum, the Mississippi District Court, could determine the issues and that the normal review procedure, including certiorari, would be available to any party dissatisfied with the result.² (Miss. Br. in Opp. at 6, 7; App. at 86a, 87a)

By order issued October 3, 1988, this Court denied the application for stay of the proceedings in the Mississippi District Court. *Louisiana v. Mississippi*, 488 U.S. 808 (1988); App. at 89a. Thereafter by order dated December 12, 1988, the motion of Louisiana for leave to file a bill of complaint was denied. 488 U.S. 990, 991 (1988); App. at 91a. The dissent filed by Justice White noted that this Court had "exclusive jurisdiction over controversies between States" and that "[n]o other court may entertain Louisiana's complaint against Mississippi." *Id.* at 991; App. at 91a. It further noted that, while the "suit might settle the dispute among the [private] parties and the State," a judgment that the island is in Louisiana "would not bind Mississippi," emphasizing again that a boundary dispute between two States is "exclusively our business." *Id.*

² It was also argued that the expenses involved militated in favor of permitting a decision by the District Court of Mississippi. App. at 86a.

No opinion was filed by the majority.³ Louisiana's motion for rehearing and alternative motion to file a separate complaint were denied by order issued February 27, 1989. *Louisiana v. Mississippi*, 489 U.S. 1050 (1989); App. at 93a.

The matter proceeded to trial before the Mississippi District Court. Findings of fact were made by the trial judge with respect to the location of the boundary between Mississippi and Louisiana and the conclusion was reached pursuant to such findings that Stack Island was located within Mississippi. *See* App. at 63a, 76a. The trial judge also reviewed the facts regarding Mississippi's exercise of dominion and jurisdiction over Stack Island for a long period of time and found that Louisiana was barred by the Doctrine of Acquiescence.⁴ App. at 37a-41a. Finally, title was quieted in the Houston group. App. at 74a, 75a.

Louisiana and the Port Commission appealed. The Fifth Circuit reversed. Describing the case as a "boundary dispute as treacherous as Old Man River itself," the Fifth

³ The decision was by a vote of five-to-three, Justice Brennan not participating.

⁴ Stack Island was patented by the United States to Stephen B. Blackwell as land within Issaquena County, Mississippi in 1888, effective 1881, and pursuant to an 1881 survey. The trial judge's findings largely addressed expert interpretation of documentary evidence with respect to circumstances existing in 1881, as well as factual matters relating to acquiescence. *See* App. at 24a, *et seq.*, 29a, 32a, 36a. Other evidence in the record regarding the location of Stack Island prior to 1881 was not specifically addressed.

Circuit stated that the findings of fact made by the trial judge were "clearly erroneous," entered findings of its own, and concluded that Stack Island lay within the jurisdictional limits of the State of Louisiana. 937 F.2d at 252; App. at 1a.⁵

A Petition for Rehearing and a Suggestion for Rehearing En Banc were denied. App. at 16a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit erred as a matter of law in looking only to evidence from 1881 forward, rather than from 1812 when Louisiana became a state, in determining the location of the thalweg of the Mississippi River and the first known existence of Stack Island. It substituted its own evaluation of the evidence for that of the Mississippi District Court, contrary to this Court's pronouncement about the proper scope of review in a case tried without a jury. If this were only a dispute between private claimants to land, these errors might not merit review here, but when they resulted in an erroneous determination of the boundary between the States of Louisiana and Mississippi, they require the attention of this Court. This is underlined by the uncertainty about the binding effect of the judgment below, uncertainty that only this Court can resolve.

⁵ The court below noted that Louisiana had sought to have this Court exercise its original jurisdiction in what it described as "this dispute between states" but observed, "Inexplicably, the High Court declined the invitation." *Houston v. Thomas*, 937 F.2d at 249; App. at 3a.

I. THE COURT BELOW MISAPPLIED THE RULE OF THE THALWEG AND THE DOCTRINE OF ACQUIESCENCE

In determining Stack Island to be in Louisiana, the Fifth Circuit committed fundamental error in the application of the Thalweg Rule. It addressed only evidence from 1881 forward. Under the Rule of the Thalweg, such evidence was irrelevant.

If Stack Island was east of the boundary channel of the Mississippi River at any time, beginning with the date that Louisiana became a state (1812), or if Stack Island was formed thereafter east of the boundary channel, Stack Island is a part of Mississippi. This is the rule laid down in *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1871).

When fixed by navigable waters, such as the Mississippi River, the Rule of the Thalweg locates the boundary between states along the thalweg, or center, of the main navigation channel of the dividing waterway. The boundary shifts gradually with gradual changes in the location of the channel but does not shift with avulsive, sudden or violent changes. The Island Rule, applicable here, represents an exception to the Rule of the Thalweg in that, once an island is within the confines of the state's boundaries, it remains a part of the state's territory even though the thalweg may shift gradually from one side of the island to the other. In this case, as an example, even though the thalweg might shift from the west side of Stack Island to the east side on a gradual basis, the island would remain within the territorial limits of Mississippi. These rules are well established by the decisions of this

Court.⁶ See, e.g., *Iowa v. Illinois*, 147 U.S. 1 (1893); *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Louisiana v. Mississippi*, 466 U.S. 96 (1984); *Nebraska v. Iowa*, 143 U.S. 359 (1892); *Missouri v. Kentucky*, *supra*.

A. The Fifth Circuit's Error in Applying The Thalweg Rule

The Fifth Circuit addressed only evidence with respect to the location of the thalweg from and after 1881.⁷ If Stack Island existed at the time of the admission of Louisiana or Mississippi to the Union or prior to 1881, which is clear from the evidence, is undisputed, and is assumed for purposes of the Fifth Circuit's decision, the location of the thalweg in 1881 is irrelevant. Under the Island Rule, Stack Island would remain a part of the state within whose jurisdiction it was originally located. In order for the Fifth Circuit to determine whether Stack Island was within the territorial limits of Mississippi or Louisiana, it was necessary for it to determine where the island was located at the earliest date of its known existence.

⁶ See general discussion and citations in *Uihhorn v. U.S. Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967). The Fifth Circuit recognizes the Island Rule exception. See 937 F.2d at 258; App. at 6a.

⁷ It failed to consider the substantial body of evidence in the record with respect to the existence and location of Stack Island prior to 1881.

The record evidence shows Stack Island as having been in existence in the 1826-1827 era.⁸ Such evidence showed the island as lying east of the boundary channel, separated from the Mississippi mainland by a narrow chute. Further, maps generated circa 1867 showed the island within the jurisdiction of Mississippi. A map entitled "Reconnaissance of the Mississippi River in 1874" made pursuant to an 1874 act of Congress reflected Stack Island in Mississippi. An 1879 map made as a part of a blueprint plan for the Mississippi River Commission likewise showed the island in Mississippi with only a narrow chute separating it from the Mississippi mainland. This documentary evidence is not mentioned or considered by the Fifth Circuit nor was evidence of an 1828-1829 United States survey of what is now East Carroll Parish, Louisiana, showing no island in the Mississippi River on the Louisiana side of the boundary channel.

To reverse and render, the Fifth Circuit was required to review the entire record, including evidence of the location of and existence of Stack Island prior to 1881. It

⁸ In earlier litigation between the Houston Group and an adverse claimant, the Fifth Circuit noted in its opinion: "We begin with 'Stack Island' in the Mississippi River, so identified in the original 1826 United States Land Survey (platted as 'Island No. 94' by the government in 1881)." *Houston v. United States Gypsum Co.*, 569 F.2d 880, 881 (5th Cir. 1978). Indeed, in that case the court observed, "An avulsion does not change the boundary. Hence, all the territory involved in this controversy is in Issaquena County, Mississippi, even though Stack Island is now west of the main channel of the Mississippi River." *Id.* at 881, n. 2.

did not do so.⁹ The court below simply misunderstood the Rule of the Thalweg and in effect transferred Mississippi land to Louisiana, a transfer this Court should correct.

B. Misapplication of the Doctrine of Acquiescence

The Doctrine of Acquiescence is an equally well-established rule fixing state boundaries as a result of acts of state dominion, control, and sovereignty over land coupled with a failure by the adjoining state to assert claims of right or jurisdiction. *Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Louisiana v. Mississippi*, 202 U.S. 1 (1906); *Indiana v. Kentucky*, 136 U.S. 479 (1890).

The trial court, having found facts and concluded that the Thalweg and Island Rules located Stack Island in Mississippi, made additional findings with respect to acquiescence to secure its ultimate conclusion. See App. at 37a. The Fifth Circuit, selectively discussing portions of the evidence, concluded that the facts found by the trial court did not establish acquiescence. See 937 F.2d at 253-54; App. at 12a-14a. Its application of the facts to the law, however, was in error and created an erroneous result that this Court should correct. The record

⁹ No evidence was offered by Louisiana dated prior in time to 1882. Under these circumstances, the Fifth Circuit was required to accept as uncontroverted all evidence in the record with respect to the location of Stack Island dated prior to 1881. This evidence demonstrated that the island was at all times from the earliest indications of its existence located within the jurisdiction of the State of Mississippi.

overwhelmingly supports the trial court's finding of acquiescence, both as a matter of fact and law.¹⁰

While acquiescence is a matter to be determined by the fact finder, acts indicating acquiescence include:

1. Patents issued by the United States showing property to be in a particular state. *Louisiana v. Mississippi*, 202 U.S. 1, 55-56 (1906). Stack Island was patented as land in Mississippi. App. at 37a.
2. The assessment and payment of taxes. *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Arkansas v. Tennessee*, 310 U.S. at 567-68; *Louisiana v. Mississippi*, 202 U.S. at 55; *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893). The trial court found taxes to have been assessed by Issaquena County, Mississippi, since 1889. App. at 37a-40a.
3. Acts and recognitions of individuals that tend to show in which state the land is located. *Louisiana v. Mississippi*, 202 U.S. at 56; *Arkansas v. Tennessee*, 310 U.S. at 565-66; The trial court identified these at length. App. at 37a, 38a.
4. Court actions concerning the land. *Indiana v. Kentucky*, 136 U.S. at 518-19. Both Mississippi state and federal courts have exercised jurisdiction over controversies involving Stack Island. App. at 21a, 52a. See, e.g., *Houston v. U.S. Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978), rehearing denied, 580 F.2d 815 (5th Cir. 1978), on remand, 652 F.2d 467

¹⁰ The determination of acquiescence is a "question of fact." *Arkansas v. Tennessee*, 310 U.S. at 567. The Master in that case recited evidence of dominion and jurisdiction similar to that found by the trial court here. This Court concluded the finding of acquiescence to be "fully supported by the record." *Id.* at 569. The same is true here.

(5th Cir. 1981). The decisions of the Fifth Circuit also discuss facts relating to the use and payment of taxes on Stack Island to Mississippi authorities for the last half century. See 652 F.2d at 472; App. at 21a, 38a.

5. Township surveys prepared by the United States General Land Office. *Indiana v. Kentucky*, 136 U.S. 479, 512-514 (1890); *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1906). Such surveys indicated Stack Island to be in Mississippi.
6. Grants by the state to individuals. *Indiana v. Kentucky*, 136 U.S. at 516-18; *Louisiana v. Mississippi*, 202 U.S. at 52-53. Mississippi deeded the land to the predecessor of the Houston Group in 1933.

On the other hand, the trial court found no evidence of Louisiana acting in any respect to assert jurisdiction or authority over Stack Island prior to its intervention in this action. See App. at 38a-41a.

Apart from its error in the treatment of the trial court's fact-findings with respect to the location of the thalweg and acquiescence, the court below clearly erred in concluding that its placement of the thalweg in 1881 established the boundary between Louisiana and Mississippi.

II. THE COURT BELOW EXCEEDED THE PROPER SCOPE OF REVIEW UNDER RULE 52(a)

This case was tried to the court without a jury. The court was required to determine the plausibility of conflicting testimony of experts presented by Mississippi and Louisiana in interpreting century-old documentary evidence. On the basis of this determination, the trial court

made findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure.

The trial court found that in 1881 the thalweg of the Mississippi River lay west of Stack Island.¹¹ It made findings with respect to dominion, control, and sovereignty over Stack Island by Mississippi and the failure of Louisiana to establish any definitive claim, right or jurisdiction over the land.¹² These findings should have been regarded as coming to the Fifth Circuit "well armed with the buckler and shield" of Rule 52(a). *Horton v. U.S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). The rule provides that findings of fact "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a).

The Fifth Circuit said that it was "resolving this factual dispute. . . against the backdrop of the clearly erroneous standard," 937 F.2d at 250-51; App. at 7a, but it misconceived what that standard means. It says, two paragraphs later:

Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence, we are "left with the clear impression that an error has been made."

¹¹ No specific findings were made with respect to the existence of Stack Island prior to 1881, although that finding is subsumed in the determination of its location at that date.

¹² The trial court stated that it made its finding that Stack Island is located in Mississippi under the Doctrine of Acquiescence if it should be found to have erred in its determination that Stack Island is located in Mississippi under the Rule of the Thalweg. App. at 37a.

Stauffer Chemical Co. v. Brunson, 380 F.2d 174, 181 (5th Cir. 1967).

937 F.2d at 251; App. at 8a.

A decision that relies on a 1967 precedent to measure the reach of Rule 52(a) in 1991 is inherently suspect. A great deal has happened in the last quarter-century to clarify the scope of appellate review in nonjury cases. The rule was amended in 1985 to resolve a matter that long has been in controversy and to specify that the "clearly erroneous" test applies to all findings of fact, "whether based on oral or documentary evidence."

Even more important was this Court's decision in that same year in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Justice White's opinion for the Court in that case clarified much that had previously been in doubt and narrowed or eliminated the freedom that some courts of appeals had thought they had to redetermine factual issues. The Court restates the general test as whether the reviewing court "is left with a definite and firm conviction that a mistake has been committed," 470 U.S. at 573, but it gives that test a new meaning:

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible

views of the evidence the fact-finder's choice between them cannot be clearly erroneous.

470 U.S. at 573-74 [citations omitted].

The evidence on the critical issue about the thalweg involved a combination of documentary evidence and expert interpretation of that evidence. The Fifth Circuit simply disagreed with the trial court's findings on that issue and concluded that Mississippi's expert witness had misinterpreted the documentary evidence before him. In short, the Fifth Circuit, contrary to the trial court, accepted the interpretation of the Louisiana experts rather than that of the Mississippi expert.¹³ This is not permissible under the *Anderson* rule. If, as repeatedly stated by the Fifth Circuit, the evidence is inconclusive, then there are two permissible views of it, the district court's reading of the evidence cannot be thought

¹³ The court below concluded that it was "illogical" for vessels to employ a route that was longer and marked by treacherous "shoals" and on this basis held that the thalweg was incorrectly found by the trial court. 937 F.2d at 251; App. at 9a. It brushed aside evidence to the contrary on which the trial court had relied. A surveyor's notation that there was a "good deep channel" to the west of Stack Island was dismissed as a "vague notation" and "less than determinative." *Id.* The placement of United States navigation lights on the banks of the river as reflected on a shoreline survey was thought to be "inconclusive." *Id.* at 252; App. at 9a. A reference in the shoreline survey to "shoals" at the foot of the east channel was thought to be "refuted" by hydrographic data obtained three months later and shown on another survey map, and these "factual disputes" were thought to demonstrate the "inconclusiveness" of the shoreline survey. *Id.* at 252, n. 4; App. at 9a.

implausible and the findings cannot be set aside as "clearly erroneous."

This Court spoke with such clarity in *Anderson* that the decision below might be regarded as an aberration, not worthy of review here. There would be much to be said for that view if this were a purely private dispute. But when the boundary between two states is at issue,¹⁴ the rules as laid down by this Court must be followed with precision and an appellate court cannot be permitted to set aside the considered decision of a district court because the appellate court would have weighed the evidence differently and reached a different result.

III. THERE IS A SERIOUS QUESTION, WHICH ONLY THIS COURT CAN RESOLVE, ABOUT THE BINDING EFFECT OF THE JUDGMENT BELOW

If the decision of the Fifth Circuit is allowed to stand without review by this Court, its binding effect on any or all of the parties to the suit will be wholly uncertain. Stack Island will be left neither in the State of Mississippi nor the State of Louisiana but in the state of legal limbo.

One view is that only this Court can decide where the boundary lies. This was the view of Louisiana when it unsuccessfully sought leave to invoke the original jurisdiction of this Court to resolve this dispute. In paragraph

¹⁴ Louisiana characterized the boundary issue as one of "major and substantial significance." (La. Comp. at 11; App. at 81a)

XX of its proposed complaint, it alleged that "[t]he decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described." App. at 82a. In its Brief in Support of its Motion, at page 16, it said: "The Supreme Court of the United States is the only forum to settle this dispute, fix the boundary line between the states, and determine finally the rights of the parties." App. at 84a. And the Court itself has said that "this Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved." *Georgia v. South Carolina*, ___ U.S. ___, 110 S.Ct. 2903, 2913 (1990).

Another view would rely on "this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States." *Durfee v. Duke*, 375 U.S. 106, 115 (1963). On this view, if the Mississippi District Court had found that Stack Island is in Mississippi and if that decision had been affirmed, it would bind all the parties to the suit, but, since the judgment below is that the land is in Louisiana and the case came from a Mississippi court, it cannot be given any effect. This appears to have been the view of Justice White and of the two other Justices who joined his dissent from the denial of Louisiana's motion for leave to file a bill of complaint. "Perhaps denial of leave to file rests on the possibility that the private action will go forward with Louisiana as a party and that a judgment unfavorable to, but binding on, Louisiana will be entered." *Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988) (White, J., dissenting). This also is the

view Louisiana took at page 9 of its Brief in Support of Petition for Rehearing of the denial of leave to file.

[A] judgment by the District Court that Island No. 94 is in Louisiana would not bind Mississippi, nor necessarily the numerous private parties involved. Such a judgment would not necessarily deter dual assessment and taxation by the taxing bodies of the two states, nor dissuade both Mississippi and Louisiana claimants from asserting acts of ownership and possession.

App. at 96a.

There is still another possibility. This is that the judgment of the Fifth Circuit that the land is in Louisiana is, unless reversed here, final and binding on all the parties. This is not a case like *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963), where the states involved were not bound because they were not parties to the purely private litigation. Nor is it like *Georgia v. South Carolina*, ___ U.S. ___, 110 S.Ct. 2903, 2913 (1990), where some local officials had been served with process, but "South Carolina itself was never served and made no appearance." Although the present suit began as an action between private parties, both Louisiana and Mississippi appeared in the district court, both sought a declaration of "the proper boundary line between the State of Louisiana and the State of Mississippi," and both took an active part in the litigation in the trial court and on appeal.

This Court has said that *Durfee v. Duke* established "the rule of jurisdictional finality" and "the *Durfee* Court explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction."

Underwriters National Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Assn., 455 U.S. 691, 705, n. 11 (1982). On this third view, the location of Stack Island has been fully litigated and judicially determined in a proceeding in which both of the States and all of the private parties concerned took part, and the rule of jurisdictional finality means that this determination is binding on all of them.

It is not necessary now to say which of these views is correct. Suffice it to say that there is support in reason and precedent for all three of them. Unless this Court settles the matter, the certain consequence will be, as Louisiana predicted in its brief quoted above, that both States will continue to assert jurisdiction over the land in question and that further litigation will take place. To leave this in limbo after many years of litigation is no way to treat even the private parties, much less the sovereign States.

This Court should grant certiorari not only to resolve the important substantive issues the case presents but to settle, as only the Court can, the effect of the judgment on all the states and private interests involved.¹⁵

¹⁵ If the Court should conclude that the first view expressed in this section of the Petition is correct and that state boundaries can only be settled by the exercise of the original and exclusive jurisdiction granted by 28 U.S.C. § 1251(a), we suggest that it can treat this Petition as a motion to invoke that original jurisdiction and that, rather than appointing a Master, the Court may consider the findings of the trial court, as reviewed by the court below, as equivalent to those of a Master and as a sufficient basis on which to make a decision in the exercise of that original jurisdiction.

CONCLUSION

This Court should issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

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January 16, 1992

91-1158

No. _____

(2)

Supreme Court, U.S.
FILED
JAN 16 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

APPENDIX TO THE PETITION FOR
WRIT OF CERTIORARI

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**Julia Donelson HOUSTON, et
al., Plaintiffs-Appellees,**

v.

**Ruth M. THOMAS, et al., Defendants,
State of Louisiana and Lake Providence
Port Commission, Intervening
Defendants-Appellants.**

No. 90-1031.

United States Court of Appeals
Fifth Circuit.

Aug. 5, 1991.

Appeal was taken from an order of the United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Chief Judge, which determined that accretions to west bank of Mississippi River were within territorial boundaries of State of Mississippi, rather than State of Louisiana. The Court of Appeals, Duhé, Circuit Judge, held that: (1) court clearly erred in concluding that boundary thalweg lay west of certain island in year that land was patented, and (2) court improperly applied doctrine of acquiescence to its factual findings.

Reversed and rendered.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ and DUHÉ, Circuit Judges.¹

¹ Judge Alvin B. Rubin was a member of the original panel but died on June 11, 1991 before this decision was rendered. This matter is being decided by a quorum. 28 U.S.C. § 46(d).

DUHÉ, Circuit Judge:

In a boundary dispute as treacherous as old man river itself, the appellants challenge the district court's conclusion that accretions to the west bank of the Mississippi River are within the territorial boundaries of Mississippi. Finding that the district court erred in its initial placement of the boundary thalweg between Louisiana and Mississippi, we reverse and render judgment for the appellants.

Meandering Through the Courts: The Proceedings Upstream

At issue in phase one of this bifurcated case was the sovereign ownership of a mass of accretions lying along the west bank of the Mississippi river near Lake Providence, Louisiana.² The action was originally instituted by Mississippi citizens in federal district court as a suit to quiet title against Louisianians asserting ownership of the accreted lands. One year later, the State of Louisiana and the Lake Providence Port Commission intervened, praying that the accreted portion be adjudged Louisiana property. The intervenors filed a petition in the United States Supreme Court, requesting that the court exercise its

² The appellees and some maps refer to these accretions as "Stack Island." These same maps also refer to a nearby island-shaped land mass by the same designation. While the latter exhibits true island characteristics, the accretionary features only exhibit such characteristics during very high water levels. To avoid confusion, we refer in this opinion to the disputed lands as "the accretions," "the accreted land," or "the accretionary features."

original jurisdiction in this dispute between states. Inexplicably, the High Court declined the invitation.

The case proceeded to trial on the question of state boundary only, where the district judge waded through the testimony of experts and would-be landowners, as well as maps, surveys, and charts dating back to the late nineteenth century. The court ruled that the interstate boundary, frozen by an avulsive shift in the river, placed the disputed lands within Mississippi. Alternatively, the court found that Mississippi had exercised sovereign authority over the accretions, and that Louisiana had acquiesced in Mississippi's assertion of ownership. From that judgment, Louisiana takes this appeal.

Wading In: Two Tales of One River

We begin our voyage down the river with a review of the factual bases for each party's ownership claim. Their tales are so divergent that each will be separately recounted.

Louisiana contends that at the time the land grant patent was issued to Stephen Blackwell in 1881, a land mass identified on the General Land Office survey as "Island Number 94," or "Stack Island," was subject to the divided flow of the Mississippi River. Although relatively narrow, the channel flowing to the east of the island comprised the main navigable thread, or thalweg, of the river.³ Accordingly, since federal common law fixes the

³ The term "thalweg" is a legal term of art used to describe the middle of the principal [channel] of a waterway. *Louisiana v. Mississippi*, 466 U.S. 96, 100, 104 S.Ct. 1645, 1648, 80 L.Ed.2d 74 (1984).

interstate boundary at the thalweg, Louisiana argues that the island was incorrectly attributed to Mississippi on the 1881 survey plat.

Louisiana notes that a sudden and perceptible (avulsive) change in the main course of the river occurred in 1882, when dikes constructed by the Mississippi River Commission induced a change in the flow pattern, diverting river traffic into the west channel. Because that change was avulsive, however, the boundary remained legally fixed in the east channel. Flooding enlarged the east channel in 1912, filling the west channel impassibly with silt, and restoring the east channel to dominance. Meanwhile, Stack Island was gradually eroding away, and its fragments were accreting downstream on the west bank of the river near Lake Providence. Eventually, Louisiana suggests it was replaced by a new island formed in approximately the same location. Louisiana further claims that at all relevant times, it exercised sovereign authority over the disputed portion.

In contrast, Mississippi argues that in 1881, shoreline surveys and government lights indicated that the thalweg of the river was located to the west of Stack Island. Because the middle of the west channel formed the interstate boundary, the thalweg, Stack Island was properly attributed to Mississippi in the land grant survey. Mississippi acknowledges that the east channel gradually enlarged in the early 1900's, and the west channel was abandoned by navigation when it filled with silt and alluvium. However, because it characterizes that gradual shift as "avulsive" in nature, it suggests the interstate boundary remained fixed in the west channel.

Though it concedes the island has undergone substantial changes due to the processes of erosion and accretion, it maintains that the "original" Stack Island never eroded away. Finally, Mississippi maintains that it has consistently claimed, taxed, and exercised dominion over the accreted portion.

Navigating a Legal Course: The Rules of the River

Under the "Rule of the Thalweg," when a navigable river flows between states, the middle thread of the main channel of the river constitutes the interstate boundary. *Iowa v. Illinois*, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1893). In early cases, courts defined the "main channel" as the deepest and most navigable branch of a waterway. However, in *Louisiana v. Mississippi*, 466 U.S. 96, 104 S.Ct. 1645, 80 L.Ed.2d 74 (1984), noting that the descriptions "deepest" and "most navigable" are frequently not synonymous, the Court refined the rule. Accordingly, current law dictates that the channel used as the "ordinary course of traffic on the river" is the river's thalweg. *Id.* at 101, 104 S.Ct. at 1648.

At least one exception to the Rule of the Thalweg is recognized: where an avulsive shift in the course of the river occurs, the boundary remains frozen in the former thalweg. Thus, "where a stream, which is the boundary, for any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary. . . ." *Nebraska v. Iowa*, 143 U.S. 359, 361, 12 S.Ct. 396, 397, 36 L.Ed. 186 (1892).

Although "true" avulsive action is typically described as sudden and perceptible, our court has modified that characterization, opting to apply the avulsion exception where a change in the identity of the thalweg was slow and gradual. In *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir.), cert. denied, 293 U.S. 591, 55 S.Ct. 106, 79 L.Ed. 686 (1934), the ownership of Glasscock Island, a land mass in the Mississippi River, was the subject of a dispute between a Mississippi resident and a Louisiana corporation. The evidence revealed that although the east channel was once the thalweg, the west channel had gradually become dominant through the natural, dynamic forces of the river. While not contesting the original designation of the east channel as the thalweg, the Mississippi plaintiff argued that absent a sudden, perceptible shift in the river's course, the interstate boundary should follow the main channel of the river as it shifted westward.

Our court relying on *Missouri v. Kentucky*, 11 Wall. 395, 20 L.Ed. 116 (1870), disagreed. Though noting that "strictly speaking there was no avulsion," *Id.* at 168, it concluded:

... where the main channel changes from one side of an island to the other, it seems that the same rules as to boundary govern as are applied in cases of avulsion. . . . The old channel remains the boundary in the case of an island as well as in that of an avulsion.

Id. Thus, in the case of an island, even a gradual change in the orientation of the thalweg effects no change in the boundary, or in the sovereign ownership of the island.

Distilling these legal principles, we apply a two-step analysis in resolving this factual dispute. First, we determine which channel constituted the boundary thalweg in 1881. Second, we consider whether, under the *Hogue* exception, that boundary remained fixed notwithstanding a shift in the identity of the original thalweg. We conduct this inquiry against the backdrop of the clearly erroneous standard, giving due regard to the trial judge's assessments of the witnesses' credibility. See Fed. Rule of Civ. Pro. 52(a).

Step One: Looking Back to 1881

The appellants submit that the district court clearly erred in concluding that the boundary thalweg lay west of Stack Island in 1881, the year the land was patented to Stephen Blackwell. We agree.

In reaching its conclusion, the district court relied primarily on the interpretation given by Austin Smith, Mississippi's only expert witness, of information contained in an 1881 shoreline survey. The district court considered the surveyor's notation of a "good deep channel" to the west of the island, and Smith's testimony that depth was the determinative factor, as persuasive evidence of the dominance of that channel. It also noted the presence of a government navigation light on the west bank of the river near the island, concluding that light served to guide river traffic from the head of Stack Island down the west channel. Without elaboration, the court pronounced an 1881 survey accompanying a Mississippi River Commission (MRC) study inconclusive, and declined to consider it in formulating its findings.

Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence, we are "left with the clear impression that an error has been made." *Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir.1967).

We recognize that it is not within the province of the reviewing court to second-guess the district court's assessment of Smith's credibility as a witness. However, it is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinion. The first such piece of evidence is the hydrographic survey completed in December of 1881 pursuant to a major Congressionally-funded MRC improvement plan. That plan, for which Congress appropriated nearly one million dollars, was designed in part to improve navigation in the vicinity of the Lake Providence reach. The report issued in 1883 at the conclusion of the project clearly designates the east channel as the "main channel" at the time of the December 1881 survey. For example, the report lists as one of the "general effect[s] of the work" the "closing of the main channel of the river . . . and bringing it back to the [downstream] right of Stack Island by a system of deflecting dikes."

The report continues:

. . . In order to force the main channel of the river which flowed down the [east channel] . . . a main dike . . . was driven from a point below the foot of Baleshed Bar to the head of Stack Island, leaving the low water main channel from Longwood through the [east channel] open for the passage of boats. (emphasis added)

The district court also ignored the hydrographic data contained in an MRC survey depicting the topography and hydrography of this portion of the river in 1881-82. While those data indicate the presence of shoals near the northern end of Stack Island in the west channel, the hydrographic soundings depict ample depths, even at low water, for typical river traffic in the east channel. Given these facts, it is illogical that vessels would employ a route that was not only approximately one mile longer, but also marked by treacherous shoals.

The evidence relied upon by Mississippi, Smith, and ultimately the district court simply does not contain the type of data necessary to support a contrary conclusion. The 1881 *shoreline* survey was not intended to reflect the hydrographic features of this part of the river, nor does it. Unlike the MRC survey, done in anticipation of major dike construction in the river itself, the shoreline survey of Stack Island was intended for patent purposes only, and contains no true hydrographic readings.

The deputy surveyor's vague notation of a "good deep channel" to the west of the island is less than determinative. Not only is the depth of the channel no longer the focus of our inquiry, *Louisiana v. Mississippi*, 466 U.S. at 101-02, 104 S.Ct. at 1648, but the survey fails to reflect any depth soundings in the east channel.⁴ Because

⁴ The shoreline survey does make some reference to "shoals" at the foot of the east channel. This finding is refuted by hydrographic data obtained just three months later and depicted on the MRC survey map. Although we cannot resolve factual disputes, we note the inconsistency in the evidence to demonstrate the inconclusiveness of the shoreline survey.

we endeavor to determine the relative dominance of the channels, the shoreline survey simply does not contain the type of data necessary to determine the identity of the thalweg in 1881.

Equally inconclusive is the placement of the U.S. navigation lights along both banks of the river as reflected on the shoreline survey. In the vicinity of the Lake Providence reach, that survey depicts a navigation light on the east bank of the river at Reserve Plantation near the northern tip of the island, a light on the west bank directly across from the island, and a light on the east bank near the Shipland Landing south of the island. The MRC survey, completed only three months later, depicts two lights in the vicinity of the Reserve Plantation, a light on the west bank beyond the southern tip of the island, and the Shipland Landing light on the east bank. The MRC survey does not depict a navigation light on the west bank near the mid-point of the island as does the shoreline survey.

Regardless of the resolution of that factual dispute, the placement of the lights does little to determine the identity of the *low-water channel*. As the district court found, plantations located on both sides of the river were serviced by steamboats that were presumably able to use either channel at high water. Since navigation lights were needed to assist these vessels, the depiction of the light on the west bank cannot compensate for the inadequacies in the shoreline survey.

Thus, we find the court clearly erred in relying upon evidence that, regardless of its veracity, could not support

its finding. In rejecting this evidence, and Smith's interpretation of it, we note that we are not the first court to do so. In prior litigation between these same states, the Supreme Court rejected Smith's theory regarding the placement of an interstate boundary, criticizing his undue emphasis on which channel was the deepest and swiftest. *Louisiana v. Mississippi*, 466 U.S. at 103-06, 104 S.Ct. at 1649-1651. Noting that the "Smith [boundary] line did not conform to the data on the surveys . . . [and] that it was not conceivable that a mariner would adopt Smith's track of navigation," the court adopted Louisiana's proposed placement of the thalweg instead. For the reasons outlined above, we do likewise.

*Freezing the Boundary:
An Avulsive Shift?*

As the district court noted, both parties generally concede that flooding in 1911 and 1912 shifted the thalweg from the west channel to the east channel. The difference, of course, is that Mississippi suggests the thalweg was originally in the west channel, while Louisiana suggests it was diverted there from the east by the dike construction in 1882-83. Because the district court determined, as a threshold matter, that the thalweg originally lay in the west channel in 1881, it found it necessary to consider whether the 1911 shift was avulsive. Concluding that it was, the court ruled that the interstate boundary was frozen in the west channel.

Our reversal of the district court's ruling on the original location of the thalweg obviates further discussion of the avulsion issue in light of the law of this circuit.

Both parties agree, and the district court found, that the main channel lay to the west of the island from 1883 to 1911, and then shifted to the east thereafter. However, the question of whether that shift, or any prior one, was "avulsive" is irrelevant as a matter of law in this context. Under our holding in *Hogue*, even a gradual change in the identity of the "main" channel around an island effects no change in the boundary. Thus, the boundary remained frozen in the east channel, where it lay at the time of the patent in 1881, regardless of the nature of any shift in the river's course. *Hogue*, 69 F.2d at 168.

Acquiescence

Alternatively, the district court concluded that the disputed lands belonged to Mississippi under the Doctrine of Acquiescence. Because we find the district court improperly applied the law to its factual findings, we reverse this ruling as well.

Numerous cases recognize that acquiescence by one state in the exercise and preservation of an interstate boundary by another is conclusive evidence of the location of the official boundary. See e.g., *Rhode Island v. Massachusetts*, 4 How. 591, 638-39, 11 L.Ed. 1116 (1846); *Virginia v. Tennessee*, 148 U.S. 503, 522-525, 13 S.Ct. 728-735-37, 37 L.Ed. 537 (1893); *Louisiana v. Mississippi*, 202 U.S. 1, 53-57, 26 S.Ct. 408, 422-425, 50 L.Ed. 913 (1906). The Supreme Court has even noted that the doctrine pre-empts the "Rule of the Thalweg" when "it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. . . ." *Arkansas v. Tennessee*,

310 U.S. 563, 567-72, 60 S.Ct. 1026, 1030, 84 L.Ed. 1362 (1940).

Over strenuous and repeated objection from the appellants, the district court permitted the introduction of the testimony of numerous residents of the disputed lands. A colorful assortment of Mississippi citizens testified that they had occupied the accreted lands as owners, had run cattle there, had hunted and fished, and even engaged in the illegal cultivation of marijuana. There was some evidence that Mississippi assessed taxes against those individuals, although it is disputed whether the property taxed was Stack Island or the accreted lands. Other evidence suggests Mississippi law enforcement agents exercised criminal jurisdiction over the island.

Louisiana citizens testified to similar facts. Some indicated that they had hunted or fished on the lands with Louisiana licenses, and that wildlife agents had enforced Louisiana game laws on the accretions. Furthermore, Louisiana argues residents of the disputed lands have paid taxes on the accreted portions to the state of Louisiana.

Without regard to the correctness of the district court's findings on these disputed factual issues, and assuming without deciding that the evidence was properly admitted, we find much of this evidence irrelevant to the question of acquiescence. Distinct from any state law theory of adverse possession, the federal common law doctrine of acquiescence is premised upon proof of the relationship between sovereigns. Thus, details of discreet activities of individuals such as hunting, fishing, or farming are largely irrelevant. Although evidence of the

assessment of taxes by a sovereign is sometimes probative, *see e.g.*, *Arkansas v. Tennessee*, 310 U.S. at 567-72, 60 S.Ct. at 1029-1031, its persuasiveness is diminished in cases like this one where there is some evidence that both states claimed the disputed lands as a tax base.

Discounting that extraneous testimony, we are left with little evidence of any acts committed by agents of the state of Louisiana that indicate its recognition of the sovereign authority of Mississippi over the accreted lands. There was some testimony that Louisiana law enforcement agents had handed over a suspected law breaker to Mississippi for prosecution for an offense allegedly committed on the accretions. However, a few such isolated incidents do not constitute a "long-continued and uninterrupted assertion of dominion and jurisdiction over an area. . . ." *Arkansas v. Tennessee*, 310 U.S. at 471, 60 S.Ct. at 1030. Those acts are simply not of sufficient duration and magnitude to justify application of the doctrine. *See e.g.*, *California v. Nevada*, 447 U.S. 125, 130-32, 100 S.Ct. 2064, 2067-68, 65 L.Ed.2d 1 (1980) (where the evidence established California's recognition of a putative boundary for over 100 years); *Arkansas v. Tennessee*, 310 U.S. at 567-72, 60 S.Ct. at 1029-1031 (applying the doctrine where the evidence showed unchallenged an unequivocal dominion by Tennessee for 115 years); *Louisiana v. Mississippi*, 202 U.S. at 53-57, 26 S.Ct. at 422-24 (involving over 90 years of acquiescence by Mississippi). Reviewing the district court's application of the law to its factual findings *de novo*, we cannot sustain the district court's ruling on the issue of acquiescence.

Conclusion

For the foregoing reasons, we reverse the judgment of the district court adjudging the disputed property within the state of Mississippi, and enter judgment in favor of the appellants.

REVERSED and RENDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1031

JULIA DONELSON HOUSTON, ET AL.,

Plaintiffs-Appellees,

versus

RUTH M. THOMAS, ET AL.,

Defendants,

STATE OF LOUISIANA and LAKE
PROVIDENCE PORT COMMISSION,

Intervening Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion August 5, 5 Cir., 1991, F.2d)

(October 22, 1991)

Before POLITZ and DUHE, Circuit Judges.*

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT: CLERK'S NOTE:

/s/ John M. Duhé
United States
Circuit Judge

SEE FRAP AND LOCAL
RULES 41 FOR
STAY OF THE
MANDATE.

*Judge Alvin B. Rubin was a member of the original panel but died on June 11, 1991 before this decision was rendered. This matter is being decided by a quorum. 28 U.S.C. Section 46(d).

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL

PLAINTIFFS,

V.

RUTH M. THOMAS, ET AL

DEFENDANTS.

CIVIL ACTION
NO. W86-0080(B)

BENCH OPINION

BEFORE: THE HONORABLE
WILLIAM H. BARBOUR, JR.,
UNITED STATES DISTRICT JUDGE

DATE: JUNE 23, 1989

PLACE: VICKSBURG, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFF:
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INTERVENORS:
MR. GARY L. KEYSER
MR. CALVIN ADAMS

COURT REPORTER:
MS. CELESTE O. McCLELLAND, RPR

[p. 2] THE COURT: The Court has heard the evidence in this case, has heard the arguments of counsel,

and is prepared at this stage to render this bench opinion expressing finding of fact and conclusions of law as to the issue presented by the bifurcated portion of this trial.

The issue presented to the Court at this stage of the trial is basically a very simple one. It is whether the land mass in question, sometimes referred to as Stack Island or Island Number 94, lies in Mississippi or in Louisiana.

The Court makes the following findings of fact. The Plaintiffs in this case, Julia Donelson Houston, et al., are the record owners of Island Number 94 which is also referred to as Stack Island. That island was originally patented to their predecessors in title, a Mr. Blackwell, as a part of Issaquena County, Mississippi. The Court will not attempt to discuss the Plaintiffs individually but simply will say that title has been properly deraigned from the original patentee, Blackwell, to the Plaintiffs, who the Court will refer to as the Houstons.

In 1881 an island known as Island Number 94, which was also shortly thereafter or even at that time known as Stack Island, was patented to Blackwell. It lay in the vicinity of Lake Providence, Louisiana, in the stretch of the Mississippi River known as Lake Providence Reach. It is clear from the history of the work done by the Corps of Engineers in the [p. 3] Lake Providence Reach that this reach being a long reach was and has been a very unstable reach of the Mississippi River for a long period of years. In fact, it was one of the first two projects undertaken for stabilization of the navigation channel by the Mississippi River Commission which was formed in the early 1880s about the time the island was patented.

The island has been subject to quite a bit of legal controversy. This Court in the late 1970s decided the case of *Houston versus United States Gypsum Company* which was taken to the Court of Appeals for the 5th Circuit on three different occasions and recorded in the Federal Reporter Second Series with three different written opinions. That case was a contest between Mississippi owners over the ownership of the island and resulted eventually in a determination that the Houstons were the owners of the island as against the other Mississippi claimants. That lawsuit did not determine whether the island was in Mississippi or Louisiana nor did it determine whether any of the Louisiana riparian owners had any claims to the island.

The island was also subject to a lawsuit dealing with title thereof in Issaquena County, Mississippi, in the Chancery Court in about 1937 or 1938. That lawsuit was eventually settled between the prior owners and the Houstons. The Houstons had acquired title to the land through a deed of trust foreclosure sale and the propriety of [p. 4] that sale was the basic issue of that lawsuit.

The issue presented in this lawsuit was raised by the filing of the suit by the Houstons against the Louisiana riparian owners seeking in effect to quiet title to the property against the Louisiana land owners in favor of the Houstons. Since the issue was raised as to whether the land lay in Louisiana or Mississippi, the State of Louisiana joined as a Plaintiff Intervenor, and it joined the State of Mississippi as a Third Party Defendant.

The Houston Plaintiffs not only claim that the land is in Mississippi but also claim that even if the land is in

Louisiana that it by virtue of the doctrine of adverse possession or the corresponding Louisiana doctrine has title to the property as against anyone who owns land adjacent to the bank of the Louisiana side.

The State of Louisiana is interested insofar as is [sic] it claims and desires for the land in question to be included in the State of Louisiana for purposes of its own people, for tax purposes and other purposes.

The State of Mississippi logically prefers the land to be in the State of Mississippi. The State of Mississippi has adopted the arguments and proof of the Houston Plaintiffs.

The State of Louisiana is actually a set of Defendants, being the State itself as well as the Lake Providence Port Commission, a state agency, which owns riparian lands across [p. 5] the port channel from the south end of the land in question, and also by virtue of recent quitclaim deeds by which the Port Commission acquired record title to a portion of the land mass in question from various individual riparian owners who were joined as Defendants.

Also a Defendant in the case is the Fifth Louisiana Levy [sic] District which is an entity organized and existing for the purpose of maintaining the Mississippi River levies [sic] as well as other levies [sic] in a four parish district lying along the Mississippi River running south from the Arkansas/Louisiana boundary. The Levy [sic] District has claims to portions of the land mass as well as the Lake Providence Port Commission. The Court will not at this time attempt to sort out the various other named Defendants in the case, many of whom who have suffered

default judgments and others of whom who have transferred title to the Lake Providence Port Commission. That will remain for the second portion of the trial.

The issue, as stated earlier, for the Court at this time on the bifurcation portion concerns whether the land mass in question is Mississippi land or Louisiana land.

In addressing the overall issue, the first question presented to the Court is whether Stack Island, or Island 94, lay in Mississippi or Louisiana at the time of its patent to Blackwell in 1881. The patent itself was not issued, until 1888. It was based, however, on a survey which was preformed [p. 6] on August 11 and 12 of 1881. The parties appear to agree that although the patent was not issued until 1888 that it relates back to the day of the survey in August of 1881. The map prepared from the survey was introduced into evidence as P-8. The basic issue presented in this question as to where the boundary line between Mississippi and Louisiana lay at the time of the survey on August 11 and 12 of 1881 concerns the boundary thalweg of the Mississippi River on those days.

The concept of the thalweg constituting the boundary between states having a river as their common boundary was recently discussed by the United States Supreme Court in the case of *Louisiana versus Mississippi* reported at 466 US 96. This is a case that was decided in 1984. Beginning at page 100 the Court stated in regard to the boundary thalweg as follows: "The matter is further complicated by the fact that the definition of the term 'thalweg' has not been uniform or exact. The master notes in his report that this Court observed in an earlier case that the term has been defined to mean 'the middle or deepest

or most navigable channel', but he points out correctly that 'the middle' or 'deepest' or the 'most navigable' are not necessarily one and the same. Indeed, this Court itself acknowledged this fact in *Michigan versus Wisconsin*. (Deepest water and the principal navigable channel are not necessarily the same.) The doctrine of the thalweg has evolved from the presumed intent of Congress in [p. 7] establishing state boundaries and has roots in international law and in the concept of the equality of access."

"What emerges from the cases, however, is the proposition that the live thalweg is at the 'middle of the principal channel, or rather, the one usually followed.' As the master observed, and as the parties appear to agree, 'the thalweg defines the boundary, and the ordinary course of traffic on the river defines the thalweg.' Our task, therefore, is to identify the downstream course of river traffic. It appears to us, as it did to the master, to be a matter of evidence as to the course commonly taken downstream by vessels navigating the particular reach of the river. It is to the evidence that we now turn."

Thus the Supreme Court has outlined the definition of boundary thalweg as the most navigable downstream course in the river. The Court is thus required at this time to consider the evidence all the way back to 1881 and decide at that time where the most navigable channel lay.

Plaintiffs present their Exhibit P-7 as their primary evidence, that being the survey of Island Number 94 as of August 1881. The Court notes that the surveyor at that time shows a "good deep channel" with "no bottom" running to the west of the island. The surveyor also notes

along the west channel of the river "heavy caving of bank."

On his plat along the east side of the island the [p. 8] surveyor shows "east chute of river of Mississippi River" together with a "depth of 12 feet" up at the northern end of the east chute and a notation of "shoals" at the south end of the chute which lies along the east side of the island and between the island and the Mississippi mainland.

The Court would normally conclude from this map that the surveyor clearly meant to indicate that the main channel of the Mississippi River, which logically would be the channel followed by boats on a downstream course, to be to the west of the island.

The State of Louisiana and the Fifth Louisiana Levy [sic] District, which basically has the same position and has adopted the proof of the State of Louisiana and the Port Commission, and the Court will hereafter basically refer to all of them simply as the State of Louisiana, rely on charts of the Mississippi River Commission Numbers 43 and 44 which bear Exhibit Number LA-10 and on a report of the Mississippi River Commission and an attached map marked LA-18-A.

LA-10 consists of two charts taped together showing the entire reach of the river at Lake Providence. Chart Number 43 is the upper part of LA-10 and Chart 44 is the lower part. Chart 43, according to its legend, was prepared as to the topography and hydrography in 1881 and 1882. Chart Number 44 was prepared in regard to the topography and hydrography in 1882/83. Consequently

LA-10 was prepared [p. 9] subsequently to the surveyor's map, P-7.

The State of Louisiana urges that LA-10 shows that the main channel for navigation purposes lay in the chute to the east of Stack Island. As evidence of this Louisiana sites the location of United States navigation lights on the west bank of the river south of the island and on the east bank of the river at the upper end of the Stack Island chute and just opposite the northern end of Stack Island.

There is also a second navigation light on the opposite side of the river just upstream from the head of the island. The next light upstream is at Longwood Landing on the west side of the river.

The experts for Louisiana postulate that traffic traveled downstream from the Longwood Landing light over to the head of Stack Island and down the Stack Island chute to the navigation light back on the west side of the river south of Stack Island.

The State of Louisiana further argues the November 1883 report of the Mississippi River Commission engineer attached as LA-18-A together with the map or chart attached to that report. That chart showed conditions as of October 31, 1883. The report on page 423 under paragraph 4 states that "the closing of the main channel of the river, which passed between the foot of Baleshed Bar and the head of Stack Island, and bringing it back to the right of Stack Island by [p. 10] a system of deflecting dikes located on the Louisiana side of Elton Bar." And then later, . . . "so as to prevent further caving of the Mississippi shore behind the island which is already done a

great deal of damage and was increasing at an alarming rate."

On page 425 of the same report under the heading Stack Island the report says "in order to force the main channel of the river, which flowed down the Stack Island the chute, on the outside and along the face of the island between it and the Elton Bar." And then it goes on to state "the dike system that we built at the head of the Stack Island between Stack Island and Baleshed Bar, upstream of Stack Island."

The chart in the map attached to LA-18-A shows an old steamboat channel which the Louisiana parties urge indicates an old steamboat channel coming out of the Stack Island chute crossing between Stack Island and Baleshed Bar over toward the west bank of the river.

From these two exhibits and their interpretation by their experts, the Louisiana parties urge that the main navigation channel for downstream traffic by the time of these reports, 1882 and 1883, was down the Stack Island chute to the east of the island. They urge that since there was bank caving at the time these works were planned and because the Mississippi River Commission chose this stretch of river for its first work, that obviously there was a problem in [p. 11] holding the Mississippi shore and the thalweg must have been there. They argue that this must have occurred before the patent and that the survey was simply wrong.

In opposition to this theory the Plaintiffs and the State of Mississippi urge a logical reading of P-8 which is a chart of the Lake Providence Reach as depicted by a shoreline survey executed in October and November of

1881 for the Mississippi River Commission. That chart shows a Government light at the end of 1881 only a couple of months after the survey was completed not only upstream from Stack Island on the eastern bank but also across from the middle of Stack Island on the west bank. This Government light was not shown on LA-10. Mr. Smith, the expert for the Plaintiffs, drew the line which he felt was the thalweg which runs from Government light at Longwood Landing on the west side of the river across to the Government light north of Stack Island on the east side of the river, back across to the west side of the river to the Government light in the area of Albright [sic] Plantation of Mrs. M.B. Blackwell and then down the west bank of the river until it again turns back to the east bank at Shipland Landing.

The Court notes that this is an earlier map. The Court accepts the logic of Mr. Smith in that the reason for the Government light on the west bank would be to delineate the normal channel back from the east bank to the west bank and [p. 12] therefore to the west side of Stack Island.

The Court further notes in regard to this stretch of river that there were several plantation landings in 1881 and 1882 along the east bank. Beginning at south end of LA-10 there is a Shipland Landing. Further up near the southern end of Stack Island is a Ben Lowman [sic] Landing. About halfway up the east chute is Elsey [sic] Landing. Further up past the navigation lights on the east side is Reserve Landing and then slightly above that there is an Oakley Landing. Further up the river there are a Holly Ridge Landing and a Homochitto Landing.

Accordingly, the east bank of the river along this stretch was apparently fairly well developed from a plantation standpoint. It appears logical to the Court that the east channel would be used regularly by steamboats servicing these plantation landings. Accordingly, there does not seem to be any question that there would be traffic up the east chute or down as the case may be. This might explain the second Government navigation light in the vicinity of the north end of Stack Island as depicted on LA-10. At any rate, the Court does not think that this defines the normal downstream thalweg for the river and notes that also there are landings on the west side of the river, Lake Providence Landing, Arlington Landing, and Longwood Landing.

[p. 13] The Court is thus faced with conflicting evidence as to what the normal course of downstream navigation was in 1881 on this stretch of river. The Court finds that a preponderance of the evidence favors the Plaintiffs theories for the following reasons. It would appear that a surveyor making this survey of the island in 1881 would certainly be aware of the fact that the island would have to be patented either in Mississippi or Louisiana.

The surveyor indicated the good deep channel on the west side of the island. It seems clear to the Court that in August of 1881, if you rely on the survey itself, that the Court would have to find that the channel ran to the west side of the island. This theory is supported by the next most recent evidence being the shoreline survey P-8 which was conducted in October and November of 1881. The Government light on the west side of the river being the next downstream light from that at the head of Stack

Island would support Mr. Smith's theory as to the normal thalweg or downstream navigation route. The Court notes that in the west side of the river according to P-8 between Baleshed Bar to the north and the end of Stack Island to the south are depicted sand bars which would indicate that boats would need to swing to the east side of the river before swinging back to the west side. The Court feels that the old steamboat channel on the map attached to LA-18-A appears to be in the vicinity not [p. 14] only of this traversing thalweg of the river but also along the same line that the secondary traffic coming up the east chute might take, particularly taking into account the Baleshed Bar lying to the north of Stack Island.

The Court also does not find that the report itself, LA-18-A, is as conclusive as the Louisiana parties feel it is. The Court notes that LA-10 and P-8 both indicate substantial erosion of the bank along the north end of Stack Island on the Mississippi side. In fact, Louisiana 10 seems to indicate that the levy [sic] had been breached by the time of the making of that map.

The Court reads the report and these maps to indicate that the river certainly is trying to switch its course into the east chute but not necessarily that it had by 1881. The Court, accordingly, rules that as of the date of the survey that the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island. Therefore the Court concludes that at that time Stack Island was a part of the State of Mississippi rather than a part of the State of Louisiana.

The parties agreed generally that about 1911 to 1913 that the main channel of the river switched to the east

side of Stack Island. The flood charts introduced into evidence show that a substantial flood occurred at the end of 1911 and the early part of 1912. Louisiana, of course, has claimed [p. 15] that the main channel was in this east chute in 1881 and that it evulsed [sic] to the west side of the island in 1882 and 1883 when the dikes depicted on the map attached to LA-18-A were built by the Mississippi River Commission.

It appears to the Court that a preponderance of the evidence shows that this was the time and the cause of the switching of the main channel of the river to the east chute. This was an evulsive [sic] change.

Evulsive [sic] changes of the boundary thalweg do not change state boundaries. *Reserve* [sic] *versus* *State of Kentucky* 78 US 395; *Davis versus Anderson Tulley* [sic], 252 Federal Reporter, 681, 8th Circuit, 1918; *Washington versus Oregon*, 211 US 127.

Accordingly, the evulsive [sic] change which occurred in 1911 and 1912 did not change the boundary from the west side of Stack Island to the east side. In fact, the Court finds that the boundary has remained on the west side of the island until the present time. The Court in *Davis versus Anderson Tulley* [sic] stated that under the conditions of an evulsive [sic] change that the boundary remains in the old channel subject to subsequent changes in that channel brought [sic] by accretion and erosion while the water in it remains a running stream.

The next question to be answered by the Court is whether the land mass in question is the same island as Island 94, sometimes known as Stack Island, as depicted in the 1881 [p. 16] survey. Louisiana basis [sic] its claim to

the contrary primarily on series of navigation charts introduced as LA-21, 26, and 29. Basically these are annual charts of the river. Those charts show land masses within the stream as well as other features. Mr. Harrison, the expert for the Louisiana parties, superimposed on each of those charts the location of Stack Island and its shape as it existed in 1881 at the time of the patent survey. The Louisiana parties argued that by looking at those charts, that it is apparent that the migrating Stack Island, which was eroding and accreting and migrating generally in a southwesterly direction, by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared and therefore that the land mass that remains today is not the same island as Island 94, or Stack Island.

In support of this argument the Louisiana parties further assert that another island has now formed in the approximate position of the 1881 Stack Island and further that that land mass is now identified on the Government charts as Stack Island. The Court notes that there are two Stack Islands identified on the chart presented by the Louisiana parties, this "new" Stack Island as well as the land mass in question.

The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, [p. 17] LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. It is interesting to note that this very active stretch of the river between 1881 and the present eroded the west bank of the river in the Lake Providence area by up to a mile and that it from time to time has placed and removed not only

substantial sand bars but whole islands. Throughout this time period, however, substantial remnants of the original Stack Island have existed. In fact, Stack Island started out as some 700 acres. According to one survey it grew to a substantial but undetermined acreage. It reduced and then in the 1970s it was back up in the range of 4,000 acres. At the present time the land mass claimed by the Plaintiffs is of approximately 2,000 acres. During all of this time, however, some portion of Stack Island has remained above the low water mark and can be traced to an earlier map.

The Court concludes by a preponderance of the evidence that the land mass which now lies against the Louisiana bank and which is the portion claimed by the Plaintiffs, is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion. This is clearly illustrated by the overlay prepared by Mr. Smith and introduced as Exhibit P-37-B depicting various maps made at various times.

[p. 18] Of course, after approximately 1930 we have live testimony from witnesses who either worked or lived in that area and there is no testimony whatsoever that Stack Island disappeared. The Court simply thinks that the Louisiana parties' position that Stack Island disappeared because it moved out from under the location of the original Stack Island is not well taken, that such a theory would have to depend on the island entirely going under water without having anything left of it at a particular moment in time.

Accordingly, the Court finds that even though this land mass is now basically up against the Louisiana shore

and for large portions of the year completely dry between what is called the island and the high bank on the Louisiana side, that it is the remnant of Stack Island and is still owned by the Plaintiffs subject to any adverse possession claims that might be disposed of later by the Court.

The thalweg or boundary thalweg therefore remained on the west side of Stack Island during this process of southwestwardly migration over the long period of time between 1881 and about 1954. During that period the boundary was subject to the remains of the old west channel as it was changed from time to time by accretion and erosion. In approximately 1954 the flow on the west side of Stack Island ceased. At that time the boundary became fixed and is the boundary at this time. That boundary was platted by Mr. [p. 19] Smith by geographical calls as set forth in the original complaint filed in this case and was placed on Exhibit P-32. The Court finds that that boundary is the fixed boundary between Louisiana and Mississippi.

The final question to be addressed by the Court is how much of the land mass claimed by the Plaintiffs is Stack Island. As the Court stated earlier the land mass is sizeable [sic], consisting of approximately 2,000 acres at the present time and being a narrow land mass approximately 7 or 8 miles long lying along the west bank in the Lake Providence vicinity. The Plaintiffs claim that the northern end of Stack Island is the line between what was formerly a chute between Baleshed Towhead or Bar and Stack Island which was eventually closed by the Corps of Engineers. The Plaintiffs claim as the southerly end all of the accretions to the island which lie across from and

south of the Lake Providence Port lands and its facility in that area.

The major question for the Court to answer in this regard is whether the southerly end of the land mass known as Stack Island is in fact part of that island. It is clear from the various maps introduced into evidence but particularly the annual navigational maps, LA-21, 27, and 29, that at least two sand bars developed at the south end of Stack Island.

It was explained by one of the experts that sand bars at [p. 20] the toe of an island naturally form if there is a divided flow around the island. It is apparent that these sand bars eventually connected with Stack Island as it grew to exist along the Louisiana shore and gradually the sand bars built up and filled in so that they are for practical purposes an extended land mass all the way down the land claimed by the Plaintiffs.

The Court notes that some leases in approximately 1970 refer to "Stack Island proper", "middle bar", and "lower bar." These were references made by Ted Houston who is now deceased but who was one of the principals in the ownership and management of the property before his death. The Court notes that those leases were given to Captan Jack Wyly, who was one of the adverse claimants prior to his conveying his claim to the island to the Port Commission, and that he took the leases in his name for the purpose of grazing cattle over the whole land mass. Further, he also at a later time was instrumental in forming a hunting club and leasing that property. The Louisiana parties in opposition to this argument did present evidence through Mr. Wyly that the hunting club not only

leased the area known as Stack Island but also the adjacent banks for the purpose of controlling all of the land. And he explained that this didn't mean that he and the other Louisiana riparian owners were not claiming the island.

[p. 21] It appears logical to the Court that the formations south of what might be called Stack Island proper were accretions caused by the flow around that island, and that until they actually attached to the island they were sand bars and were not permanent land masses. The only thing to the contrary is the testimony of Mr. Harrison who claimed them to be islands. This claim, however, was made on the basis of the charts, which were navigation charts which clearly called those formations sand bars. The Court, accordingly, concludes that the entire land mass claimed by the Plaintiff is Stack Island and accretions thereto including the southerly end of it which runs down past the Port Commission.

The Court, accordingly, concludes that the Plaintiffs' claims to the land mass insofar as claiming that it is one land mass and that it lies in the State of Mississippi are proven by a preponderance of the evidence and the Court so finds.

The Houston Plaintiffs have also presented to the Court a theory under which it claims that the State of Louisiana has acquiesced in the jurisdiction over this land mass by the State of Mississippi and therefore that if Louisiana ever had claim to the land that it has in effect given up those claims through the doctrine of acquiescence to the State of Mississippi.

[p. 22] Because of the ruling of the Court, previously stated in this bench opinion, it is not necessary to discuss the doctrine of acquiescence. That doctrine is promoted by the Plaintiffs only in the event it does not prevail in regard to its basic theory that the island has migrated to its present position.

The Court, however, realizes that this piece of land has been subject to long, torturous, and expensive litigation by the Houstons as well as the other parties and will make a ruling in regard to the issue of acquiescence in the event the case is appealed and in the event the appellate Court might find the Court is in error in ruling on the first part of this bench opinion.

The Houston Plaintiffs claim that the State of Mississippi has exercised jurisdiction over Island 94, or Stack Island, since the patent to Mr. Blackwell which was issued by the United States of America making that island part of the State of Mississippi in 1881. The proof shows that since 1889 the taxes have been paid on the island to Issaquena County, Mississippi, which is the main land adjacent to where the original Island 94, or Stack Island, was located. The Houstons to this day continue to pay Mississippi ad valorem taxes on the property. The Plaintiffs also presented proof that the Sheriff of Issaquena County claimed jurisdiction over the island for criminal purposes, [p. 23] particularly for game violation purposes; and that although he said that he would not patrol the island, that he requested the Houstons to present any game violators on the island before the Courts of Issaquena County, Mississippi. The proof further showed that Sheriff Sam House, who interestingly enough later made a claim to part of the Stack Island area, personally

carried Charles Shelton and James Kelly who has leased Stack Island from the Houstons for hunting purposes over to see the Sheriff of Issaquena County, Mississippi, to request the Sheriff of Issaquena County to help the hunting club with trespassers and game violators. Apparently Sheriff House at that time considered Stack Island to be a part of Mississippi.

Later the proof showed that officers of the Louisiana State Police were flying in a small aircraft searching for marijuana patches when they discovered one on Stack Island. They did not attempt to excise [sic] jurisdiction over the island at that time but notified the Mississippi Bureau of Narcotics who thereafter obtained a search warrant for the purpose of searching the island. Mississippi was assisted by Louisiana authorities at that time and the Louisiana authorities actually arrested suspects on the island itself but immediately turned them over to Mississippi Bureau of Narcotics agents as soon as those agents could arrive from the State of Mississippi. Mississippi prosecuted those [p. 24] parties.

The proof to the contrary on the issue of acquiescence were relatively vague statements by Jimmy House, whose family still owns part of the riparian property, and Captain Jack Wyly, who claimed a part of the property at least until he deeded his property to the Port Commission recently, that the Louisiana reputation was that this was a part of Louisiana and that game wardens from Louisiana did sometimes go on the island. The Court doubts that there is any direct proof of game wardens from Louisiana ever patrolling the island.

The State of Louisiana parties further assert that in 1908 by Legislative Act Number 191 the Louisiana Legislature authorized the vesting of the title to islands in the Mississippi River to the Fifth Louisiana Levy [sic] District. The exhibits introduced into evidence clearly show that beginning about 1907 the Levy [sic] District was interested in assisting the U.S. Army Corps of Engineers in obtaining willow logs for use in building revetments along the Louisiana bank. The islands in the river apparently had substantial growths of willow in which the Corps was interested. Knowing that there were adverse claims to those islands, the Levy [sic] District passed a series of resolutions, corresponded with the Corps about the willows, and eventually requested and prevailed in obtaining the 1908 legislation allowing the State of Louisiana to transfer the islands to it.

[p. 25] The Court at this juncture will note that under the law of the State of Louisiana, islands in the Mississippi River west of the Louisiana-Mississippi line belong to the State of Louisiana. This is not the law in Mississippi. The islands on the east side of the Mississippi-Louisiana boundary belong to the riparian owners. The Court notes in passing at this point, however, that Stack Island, or Island 94, occupies a peculiar position in that it was patented to Mr. Blackwell who was not the riparian owner at the time.

At any rate, the question then arises as to whether during the 1907 through approximately 1911 time period the activities of the Fifth Louisiana Levy [sic] District constituted acts that might break the sovereign control of the State of Mississippi over Stack Island and therefore

destroy the claim of acquiescence by the Plaintiffs in the State of Mississippi.

The Court notes first that Act 191 passed by the Legislature of Louisiana cannot be read to convey title to Stack Island itself. It is an extremely general statute. The Court further notes that the survey commissioned by the Fifth Louisiana Levy [sic] District of the islands, the plat of which was introduced as LA-37-A-1, does not purport to show Stack Island at all. At that time it is clear that Stack Island lay opposite the port of Lake Providence itself and the plat is noticeably absent in showing a land mass in that [p. 26] area. The Islands 7, 8 and 9, being the islands shown on the plat, lie well to the south of where Stack Island lay at that time.

The Court, accordingly, concludes from a preponderance of the evidence that even if it is wrong in concluding that the boundary thalweg lay always to the west of Stack Island and, accordingly, that Stack Island was in fact in Louisiana at some time, that Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by the State of Mississippi and that it is now in the State of Mississippi. The cases appear to place a minimum time limit for acquiescence in the range of 35 to 40 years. The Court notes that the acquiescence was clear from 1881 to 1907, a period of 26 years. The Court does not feel that the activity by the Louisiana Legislature was prompted by the Fifth Louisiana Levy [sic] District in the period from 1907 to 1912 was such as to interrupt the period of exclusive jurisdiction by the State of Mississippi and that in fact the period of exclusive jurisdiction by the State of Mississippi has run from 1881 to the present time.

Accordingly, the Court finds that if the land be not in the State of Mississippi because of the thalweg boundary that the land is in the State of Mississippi under the doctrine of acquiescence.

The third position taken by the Plaintiffs was that [p. 27] under the Doctrine of Lost Grant that Louisiana had lost title to or claim over Stack Island. The Plaintiffs' attorney in closing argument conceded that the Doctrine of Lost Grant is not applicable to the placing of state line but might be applicable to the issue of adverse possession which will remain after this ruling of this Court.

This concludes the findings of fact and conclusions of law in regard to this bifurcated portion of the trial. The Court at this time will ask the attorneys for the parties whether anyone requests a clarification of this ruling or addition to this ruling.

MR. BAILESS: No, Your Honor.

MR. KEYSER: Judge, we think you have covered everything.

THE COURT: All right. Mr. Adams, do you agree with that?

MR. ADAMS: Yes, sir.

THE COURT: All right. And Ms. Wetherbee, anything?

MS. WETHERBEE: Nothing, Your Honor.

THE COURT: All right. That will be the ruling of the Court in regard to this portion of the trial.

Let's go off the record here at this time.

(Off the record.)

THE COURT: The Court has asked the attorneys to [p. 28] consult with the Courtroom Deputy for the Court about agreeable time for the next portion of this trial. All other issues will be tried at that time.

Is there anything further for the record this afternoon?

MR. KEYSER: No, Your Honor.

MR. BAILESS: Your Honor, we have some pending motions and things and motions taken under advisement and I assume the Court wants to save all of those for the next hearing or are we going to try to rule on them sometime between now and then?

THE COURT: If you need them ruled on between now and then I will certainly consider doing that for you. Why don't you check over your hand and see where you stand. If making rulings between now and then would expedite the next hearing, that will be fine. If it is going to be the same amount of time we can simply make those rulings at the front end of the next portion of the trial.

MR. BAILESS: Thank you, Your Honor.

THE COURT: All right. If there is nothing further, then we will stand in recess.

(Recess.)

* * *

CERTIFICATE

[p. 29] I, Celeste O. McClelland, Registered Professional Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 28 pages contain a full, true, and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 29th day of June, 1989.

/s/ Celeste O. McClelland
Celeste O. McClelland

My Commission Expires:
June 29, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL PLAINTIFFS
VS. CIVIL ACTION NO. W86-0080(B)
RUTH M. THOMAS, ET AL DEFENDANTS

JUDGMENT
(Filed Jul. 3, 1989)

THIS CAUSE having come on for trial before the Court without a jury, beginning June 19, 1989 through June 23, 1989, to determine whether the property which is the subject of this litigation is located in the State in Mississippi or in the State of Louisiana, and the Court having heard testimony and argument of counsel, and at the conclusion of the hearing having rendered its ruling from the bench on June 23, 1989, and in accordance with said bench ruling, the Court finds as follows:

1. Stack Island, or Island No. 94, is located wholly within the State of Mississippi. The Patent from the United States of America was issued to Stephen B. Blackwell in 1888 describing the subject property as being located within Issaquena County, Mississippi. The parties agree that the issuance of the Patent relates back to the survey of Island No. 94, which said survey was dated August 11-12, 1881. The boundary thalweg has been defined by the United States Supreme Court in *Louisiana v. Mississippi*, 466 U.S. 96, at 100-101 (1984) as the middle of the principal channel, or, rather, the one usually followed by the downstream traffic of navigation. The boundary thalweg at the time of the 1881 survey is clearly

shown to be West of Stack Island. The survey (Exhibit P-7) shows "Good Deep Channel - No Bottom" West of Stack Island. The survey further shows a heavy caving bank on the West side of the island. The East Chute Channel shown on the survey reflects a depth of twelve (12) feet at the North end of the East Chute and shows shoals at the foot or Southerly end of the chute. Marshall's Shoreline Survey dated October-November, 1881 (Exhibit P-8) clearly shows by the positioning of the government navigation lights that the navigation course was West of Stack Island at that time. The evidence offered by the State of Louisiana, which evidence was dated later in time than the aforementioned surveys, does not prove that the boundary thalweg was in a different location at the time the patent survey was made. It is undisputed that the main navigation channel was West of Stack Island from about 1883 through 1909. In the period of approximately 1911 through 1913, an avulsive change occurred in the main navigation course at Stack Island. It is shown by Exhibit P-18 that by 1913 the Stack Island East Chute Channel had been adopted for navigation. This avulsive change in the main navigation course did not change the state boundary of the boundary thalweg, and the boundary between Mississippi and Louisiana remained in the old channel West of Stack Island. *Missouri v. Kentucky*, 11 Wall. 395, 408, 20 L.Ed. 116; *Davis v. Anderson-Tully Company*, 252 F. 681, 685 (8th Cir. 1918); *Washington v. Oregon*, 211 U.S. 127, 135, 29 S.Ct. 47, 53 L.Ed. 118.

2. The land mass known as Stack Island is the same land mass known as Stack Island, or Island No. 94, as described in the 1881 survey of the General Land Office

of the United States of America. There was always a land mass traced to the original Stack Island, also known as Island No. 94. Stack Island, through the processes of accretion and erosion, has always existed and has never disappeared. This is clearly illustrated by Exhibits P-37-A and P-37-B. It is also shown by the surveys and flood control and navigation exhibits offered by the State of Louisiana. The Court heard live testimony concerning the period from about 1930. There is no testimony that Stack Island has ever disappeared. The land mass located against the Louisiana bank of the Mississippi River is Stack Island. At all times the boundary thalweg remained on the West side of Stack Island still subject to the processes of accretion and erosion until the water in the boundary channel ceased to flow. The water in the boundary channel ceased to flow in about the year 1954, at which time the boundary thalweg became fixed. The fixed boundary thalweg is the line established and plat-
ted by Austin B. Smith in geographic positions as shown on Exhibit P-32 and as described by geodetic positions as reflected in Exhibit P-32-1.

3. The Southerly end of the lands claimed by the Plaintiffs is part of Stack Island. This land mass formed as a result of the divided flow of the Mississippi River on both sides of Stack Island by a process described by Austin B. Smith as confluence bar accretions. The land mass gradually built up by the natural processes of the Mississippi River and is accretions to Stack Island. The land mass Easterly of the fixed boundary thalweg is therefore within the State of Mississippi.

4. Additionally, the Plaintiffs and the State of Mississippi have presented the Doctrine of Acquiescence as a

basis for this Court to find that the subject property is located in the State of Mississippi. The State of Mississippi has exercised jurisdiction and sovereignty over the subject lands since 1881 by levying ad valorem taxes at least since 1889. Law enforcement on Stack Island has been provided by the State of Mississippi. Louisiana authorities have recognized that Mississippi has jurisdiction and sovereignty over Stack Island. Sam House, as sheriff of East Carroll Parish, Louisiana, carried James Kelly and Charles Shelton to Issaquena County, Mississippi in an attempt to get help from the Mississippi law enforcement authorities. The Louisiana State Police, after discovering through aerial reconnaissance a marijuana field on Stack Island, notified the Mississippi Bureau of Narcotics of the location of the marijuana field. Mississippi law enforcement officers arrested suspects in connection therewith and the suspects were prosecuted in Issaquena County, Mississippi. Act No. 191 of the Louisiana Legislature passed in 1907 does not destroy the claim of acquiescence. The said Act cannot be read to convey Stack Island in particular. The survey of the islands of the Fifth Louisiana levee District (Exhibit LA-37-A-1) does not show Stack Island and in fact the islands claimed by Louisiana and by the Fifth Louisiana Levee District are all located well South of Stack Island as it existed at that time. The State of Louisiana has, under the Doctrine of Acquiescence, acquiesced in the subject property being under the jurisdiction [sic] and sovereignty of the State of Mississippi. The 1907 Act No. 191 did not interrupt the acquiescence by the State of Louisiana. If the Court has erred in its determination that Stack Island is located in the State of Mississippi under the Rule of the Thalweg,

then this Court finds that Stack Island is located in the State of Mississippi under the Doctrine of Acquiescence.

5. The plaintiffs have conceded that the Doctrine of Presumption of Lost Grant has no application to the issue of setting the state boundary.

6. The boundary between the State of Louisiana and the State of Mississippi in the area of Stack Island, Mississippi, is described by geodetic positions of the vertexes, numbered Point 1 through Point 21, and described as follows:

Beginning at Pt. 1 at North Latitude $32^{\circ} 49' 25''$ and West Longitude $91^{\circ} 09' 27''$, said Pt. 1 being at the foot of the West bounds of Baleshed Towhead, Mississippi and the head of the West bounds of Stack Island, Mississippi, which was fixed along the thalweg of the abandoned Mississippi River Channel in about 1954, thence Southward with the fixed thalweg (marking the Mississippi-Louisiana boundary) in the abandoned sector of Lake Providence Bend channel at Pt. 2, Latitude $32^{\circ} 49'$ and Longitude $91^{\circ} 09' 34''$; thence to Pt. 3, Latitude $32^{\circ} 48' 47''$ and Longitude $91^{\circ} 09' 37''$; thence to Pt. 4, Latitude $32^{\circ} 48' 30''$ and Longitude $91^{\circ} 09' 39''$; thence to Pt. 5, Latitude $32^{\circ} 48'$ and Longitude $91^{\circ} 09' 47''$; thence to Pt. 6, Latitude $32^{\circ} 47' 18''$ and Longitude $91^{\circ} 09' 51''$; thence to Pt. 7, Latitude $32^{\circ} 47' 6''$ and Longitude $91^{\circ} 09' 54''$; thence to Pt. 8, Latitude $32^{\circ} 47'$ and Longitude $91^{\circ} 09' 59''$; thence to Pt. 9, Latitude $32^{\circ} 46' 50''$ and Longitude $91^{\circ} 10' 7''$; thence to Pt. 10, Latitude $32^{\circ} 46' 35''$ and Longitude $91^{\circ} 10' 14''$; thence to Pt. 11, Latitude $32^{\circ} 46' 20''$ and Longitude $91^{\circ} 10' 16''$; thence to Pt. 12, Latitude $32^{\circ} 46'$ and Longitude $91^{\circ} 10' 18''$; thence to Pt. 13, Latitude $32^{\circ} 45' 45''$ and Longitude $91^{\circ} 10' 20''$; thence to Pt. 14, Latitude $32^{\circ} 45' 30''$ and Longitude $91^{\circ} 10' 18''$; thence to Pt. 15, Latitude $32^{\circ} 45' 15''$ and Longitude $91^{\circ} 10' 12''$; thence to Pt. 16, Latitude 32°

$45'$ and Longitude $91^{\circ} 10' 01''$; thence to Pt. 17, Latitude $32^{\circ} 44' 45''$ and Longitude $91^{\circ} 09' 49''$; thence to Pt. 18, Latitude $32^{\circ} 44' 30''$ and Longitude $91^{\circ} 09' 38''$; thence to Pt. 19, Latitude $32^{\circ} 44' 23''$ and Longitude $91^{\circ} 09' 30''$; thence to Pt. 20, Latitude $32^{\circ} 44' 15''$ and Longitude $91^{\circ} 09' 18''$; thence to Pt. 21, Latitude $32^{\circ} 44' 07''$ and Longitude $91^{\circ} 09'$; thence to Pt. 22, Latitude $32^{\circ} 44'$ and Longitude $91^{\circ} 08' 44''$; said Pt. 21 marks 1975 downstream bounds of Stack Island fixed thalweg (Fixed Interstate Mississippi-Louisiana boundary) and the beginning of the 1975 live thalweg (Live Interstate, Mississippi-Louisiana boundary).

7. The second trial of this cause to determine all other issues not disposed of in this first trial is hereby set for October 2, 1989, at 9:00 a.m. in the Federal Courthouse at Vicksburg, Mississippi.

SO ORDERED AND ADJUDGED, this 3rd day of July, 1989.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL

PLAINTIFFS,

V. CIVIL ACTION NO. W86-0080(B)

RUTH M. THOMAS, ET AL

DEFENDANTS.

BENCH OPINION

BEFORE: THE HONORABLE
WILLIAM H. BARBOUR, JR.,
UNITED STATES DISTRICT JUDGE

DATE: OCTOBER 2, 1989

PLACE: VICKSBURG, MISSISSIPPI

APPEARANCES:

COUNSEL FOR PLAINTIFFS:
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MR. M. E. WARD

COUNSEL FOR INTERVENORS:
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[p. 2] THE COURT: The Court has heard the evidence presented by all parties in regard to this matter and is now prepared to enter its findings of fact and conclusions of law by way of this bench opinion.

This Court had before it by virtue of the complaint to remove cloud, originally filed in this case by the Houston Plaintiffs, a possession issue. The Defendants were the riparian owners on the Louisiana side of the Mississippi River adjacent to what has been referred to in this case as Stack Island. Some of those Defendants moved to expand the basic questions of the lawsuit to a state boundary dispute between the State of Mississippi and the State of Louisiana and those two states were joined as parties.

The Lake Providence Port Commission was a riparian owner. As the Court recollects the Lake Providence Port Commission is an entity of the State of Louisiana and, accordingly, the State of Louisiana undertook representation of the Lake Providence Port Commission.

Also eventually joined in the lawsuit was the Fifth Louisiana Levee District, which is responsible for the Mississippi River levees as well as other levees along the Lake Providence reach of the Mississippi River as well as in other areas.

The Court earlier this year bifurcated the trial of this case and heard the state boundary issue. The Court decided [p. 3] that issue favorably to the State of Mississippi and the Houston Plaintiffs deciding that Stack Island was a part of the State of Mississippi and as a part of that ruling set the boundary line between the State of Louisiana and the State of Mississippi along the west side of the area known as Stack Island.

The Court did this for reasons of jurisdiction and state law. If the Court had decided that the land mass was a part of Louisiana, the Court had concluded that the case would be more properly tried on the possessory title

issues in the Federal Courts for the State of Louisiana under Louisiana law.

When the Court decided that the property was in Mississippi, the Court determined that this Court has the jurisdiction to decide the property interest on diversity of citizenship jurisdiction and because the property is in Mississippi will apply Mississippi law to the decision as to who owns the property. The decision as to ownership of the property of course will quiet title to it.

By way of further background, this land mass has been subject to other litigation. The Court has heard proof today from Ms. Elizabeth Reed that at some point she and her mother sold some timber to the United States Gypsum Company. Timber cutting on Stack Island was the subject of successful litigation on behalf of the Houstons earlier in which it was [p. 4] determined that the Houstons had title to the island rather than United States Gypsum. Also the Houstons have litigated title to this property in the Chancery Court of Issaquena County, Mississippi, and a final decree was entered by that Court on May 7, 1968, in effect adjudging that the island was owned by the Houstons and that the Defendants named in that lawsuit had no claim to it. The Court is not sure as to the binding effect of that lawsuit and to the need for the Plaintiffs to bring this lawsuit in the face of the decision in that one. However, in the interest of settling all the issues in regard to this tract of land, both possessory and in regard to the location as to whether it is in Mississippi or Louisiana, the Court urged and probably even required that the attorneys for the Houstons include all persons who might have any claim to the property in this lawsuit.

The Court notes in this regard that under Louisiana law riparian owners own to the edge of the main river including any accretions and islands in the Louisiana portions of the river are owned by the State of Louisiana. Under Mississippi law the adjacent land owners own the islands in the Mississippi portion of the river.

The Defendant Louisiana riparian owners who filed answers and counterclaims took the legal position under Louisiana law that Stack Island had become an accretion to their east bank and that they, accordingly, have acquired [p. 5] title by accretion over time out to the edge of the main river.

The decision of the Court in the first phase of this hearing in ruling that Stack Island was an island which had migrated down-stream and to the west in which the Court set the state boundary line between the island and the Louisiana bank, in effect, eliminated the riparian owners' claims to the island under the Louisiana doctrines of accretion.

This, accordingly, leaves for the Court the question as to whether the ownership of the land known as Stack Island which is legally titled to the Houston interests has been subjected to any adverse possession by any Louisiana riparian owners.

At this point the Court notes that as a result of this lawsuit, most of the riparian owners west of Stack Island have deeded their interests in Stack Island to the Lake Providence Port Commission. The Lake Providence Port Commission operates a port facility near the south end of Stack Island which is divided from Stack Island by what

is known as the Port Commission Chute. That chute is kept open by dredging at this time.

The parties agreed in the face of the clear proof that legal title to Stack Island was in the name of the Houston interest. Accordingly, the parties agreed that the burden of proving any adverse possession under Mississippi law lay upon [p. 6] the adverse claimants. The adverse claimants in this case were the State of Louisiana and the Lake Providence Port Commission. The Lake Providence Port Commission claims under the same theory previously explained by the Court on the basis that itself is a riparian owner to accreted land lying directly east of the Port Commission property which is across the chute from the south end of Stack Island.

The Port Commission also claims as successor in interest to the riparian owners lying west of the island by virtue of numerous quitclaim deeds which have been obtained by the Port Commission from the various riparian owners the rest of Stack Island.

Accordingly, the State of Louisiana and the Lake Providence Port Commission proceeded with their proof here today in regard to adverse possession. Several witnesses were presented. Ms. Elizabeth Reed testified that she and her family had owned a plantation, which was marked on Louisiana Exhibit 1-A, and that she and her family had claimed to the water's edge. In support of her testimony, she testified that she had sold timber to United States Gypsum and had entered into a lease for all lands east of the levee.

The Court also notes that she testified that her father, Vail Deloney, had engaged in a sand and gravel operation

by excavating in the chute between the river bank and the island [p. 7] for many years prior to her father's death in 1967. The Court notes that this witness never testified to any possession east of the line which the Court has established as the state boundary.

Next, the State of Louisiana and the Port Commission called Ms. Vail Deloney, the mother of Ms. Reed. Ms. Deloney basically only testified that she had been hunting one time on the island with her husband in the 1930's.

Next, the State and the Port Commission called a Federal Fish and Wildlife Officer, Mr. Oliveros, who testified that he had written tickets for Federal violations and prosecuted them in the Louisiana Federal Court. This reportedly was offered to show that Mississippi had acquiesced in the jurisdiction of Louisiana on these lands. The Court, however, takes this testimony merely to show that the Federal authorities took these cases to Federal Court in Louisiana and Mississippi had nothing to do with them one way or the other.

Next, the State and Port Commission called two State of Louisiana Wildlife and Fisheries Enforcement Officers or Game Wardens who testified that they had hunted on Stack Island as boys, that they had each written some tickets for game offenders on the island and taken the violators either to Federal Court in the State of Louisiana or State Court in Louisiana. Both also testified they had never seen [p. 8] Mississippi game agents on the island, that they had never seen any of the Houstons or any other people from Mississippi on the island, and that they had never seen any posted signs on the island.

The Court understands the purpose of this testimony to be both that the State of Mississippi had acquiesced in the jurisdiction of Louisiana and to offset or contradict some of the other testimony which had previously been offered by the Houston Plaintiffs in regard to posting and possession by the Houstons.

The Court notes that neither of these witnesses, Murray nor Chatman, testified as to any possession by anybody specific and, accordingly, finds that their testimony is not very probative.

Finally, the State of Louisiana and Port Commission called Billy Jack Murray, who basically stated that he had hunted a number of times 12 to 15 years ago with people who were from Louisiana. He had hunted on Stack Island as well as on the unprotected side of the levee, but, again, never testified as to any specific adverse claimants of the island itself.

Accordingly, the Court would have found, if it had been asked to do so on the basis of that proof by way of a motion for directed verdict, that the State of Louisiana and the Louisiana Port Commission had failed to carry their burden of [p. 9] proof and present any substantial evidence whatsoever as to any adverse claim by any particular party.

The Court further would note that there was no statement of claim to a particular part of the property except by Ms. Reed who merely extended her property lines eastward to cover the island.

No motion for directed verdict was made by the Houstons and so, accordingly, the court will go forward

and assess the rest of the evidence which was adopted by the Houstons through the earlier testimony given to the Court.

There were a number of witnesses who testified in the first hearing of this case, all to the effect that this property has been claimed and possessed by the Houstons for many years. Jelly Higgins testified that as far back as the late 1950's and early 1960's that he and his father had run cattle on the island pursuant to various letters of authorization and grazing leases from the Houstons and that these leases covered the entire land. Mr. Higgins also testified that in the late Fifties and early Sixties that the Houstons had planted cottonwood trees on portions of Stack Island, and that between 1962 and 1970 Jelly Higgins had run trespassing hunters off of the island as well as kept the island posted, all under the authorization of Ted Houston who was managing the property for the Houston interest.

Charles Shelton testified that he had hunted on the [p. 10] island as a boy, receiving permission to hunt from Jelly Higgins' father. He also stated that he was the president of the Stack Island Hunting Club beginning in 1970, that the island was leased for the hunting club purposes from the Houstons and that the hunting club posted it every year pursuant to that lease.

He and James Kelly testified as to putting up a fence that Sam House wanted. This was to a small portion of the land on the island lying east of the high bank on the Louisiana side. Sam House was the riparian owner west of that particular property.

The Court has heard no other claim from Mr. House as to this property and does not think that the putting up of the fence by the hunting club owners would be sufficient to establish an open, adverse, notorious, continuous, and uninterrupted possession of any portion of the island by Sam House.

The Court notes, although it does not so consider, that Mr. Keyser in his offer of proof in regard to Mr. House's testimony that Mr. House would have testified that he himself had taken the fence down.

Mr. Kelly confirmed that he had seen cottonwood planters on the island as a boy. Ralph Polk testified that the cottonwood planters were hired by the Houstons and that he regularly took Ted Houston to the island for inspection [p. 11] during some of the low water season by way of tractor.

Mr. Jarvis testified that he was the land manager at the present time for the Houston interest and that in 1985 he had leased the entire island to Captan Jack Wyly.

Horsefly Higgins testified that he had leased all of Stack Island from the Houstons and he had been represented in that transaction by Mr. Wyly, who is an attorney. Mr. Wyly testified that he had leased all of the island from the Houstons for the Stack Island Hunting Club and that he himself as a riparian owner did not claim any Mississippi land.

The only other testimony which the Court has considered relevant from the first trial was that of Randy Walters, the Port Commission Director, who testified that the Port Commission had dredged in the Lake Providence

port chute between the port and the lower end of Stack Island to keep that channel open, and that barges in and out of the port facility had been tied up against the east bank of the chute which would be next to the south portion of Stack Island. The Court does not think that that establishes any possessory right or interest in the Port Commission specifically or in any other parties.

Accordingly, the Court concludes as a matter of law that the Houston Plaintiffs are the record title owners to Stack Island, being that land mass lying east of the state boundary [p. 12] established by this Court in the bench opinion following the first phase of this trial.

And, further, that the State of Louisiana, the Lake Providence Port Commission, the Fifth Louisiana Levee District, and any other Defendants have failed to make any showing as to any open, adverse, notorious, continuous and uninterrupted possession of any part of that land mass for ten years or more as required by Mississippi law.

Accordingly, the Houston Plaintiffs are entitled to a final judgment setting forth their ownership of the island and quieting title to that entire land mass in their names.

The Court earlier announced that it was taking certain motions under advisement: One being a motion to strike the counterclaims of the Defendants, which was filed on behalf of the Houston Plaintiffs; another motion filed by the State of Louisiana and the Lake Providence Port Commission moving to substitute the State of Louisiana and the Lake Providence Port Commission as the

parties and interest in this suit in place of the quitclaiming riparian owners; and a motion by the State of Louisiana and the Lake Providence Port Commission to set aside the default judgments taken against the riparian owners.

These three motions are intertwined with the defenses of the original riparian Defendants to the Plaintiffs' motion for Rule 11 sanctions in which Plaintiffs claim that the [p. 13] riparian owners who were joined as Defendants should be assessed attorneys fees and costs. Mr. Fox represented a group of those parties. Mr. Wyly represented himself and others. A third group of riparian owner Defendants never appeared in the lawsuit one way or the other and suffered default.

In regard to those who who [sic] never appeared and suffered default, the State's motion to set aside those default judgments if in fact it goes to those defendants is denied.

In regard to the Rule 11 sanctions motion, Mr. Fox argued, and Mr. Wyly in effect adopted the same position, that Mr. Fox had filed on behalf of his clients a motion to dismiss and that that motion to dismiss was not ruled upon by the Court until the case was originally set for trial on March 21, 1988. At that time, defaults had been entered against certain parties including Mr. Fox's clients.

The Court, in attempting to get all issues involving this land before it, made certain rulings at that time including a ruling which attempted to bring into Court all parties who wished to be in Court. The Court directed the defaulting Defendants to show cause within ten days

as to why they should not suffer default. The Court also at that time overruled or denied the motion to dismiss. Mr. Fox has argued to the Court and has presented witnesses that the position of his clients was that under the Federal Rules he [p. 14] was not required to answer until ten days after the motion to dismiss had been ruled upon and that his clients did so by filing an answer and counterclaim at that time.

Mr. Wyly in effect took the same position except in regard to one of his clients, Mr. Albert Surles, that Mr. Surles had appeared pro se and by way of a letter written to the Court stated that he had no interest in the property being considered by the Court.

The Court can see where the named Defendants who were attempting to appear were procedurally confused. Accordingly, the motion to strike the counterclaims of those Defendants on the basis that they were not timely filed is denied.

Also the motion of the State of Louisiana and the Lake Providence Port Commission to set aside the default judgments as to any of the parties who filed answers after March 21, 1989, is granted.

The Court also will allow the substitution of the State of Louisiana and the Lake Providence Port Commission in the place and stead of those parties who have appeared in this Court in one way or the other, and had thereafter quitclaimed their interest to the Lake Providence Port Commission.

The Court in considering Rule 11 sanctions must consider that the signature of an attorney or party constitutes a certificate by the signer that the signer has read the [p. 15] pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, that the position taken therein is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose such as unnecessary delay or to increase the cost of litigation.

The Court finds that the motion for Rule 11 sanctions is not well taken. Those Defendants who filed the motion to dismiss and thereafter filed an answer and counterclaim, were in good faith relying upon a position well founded in law, that if the Court had determined that the boundary line between the State of Mississippi and the State of Louisiana was on the east side of the island rather than the west side of the island, then the riparian owners on the Louisiana side would have a valid claim to the property. Under those circumstances it would be the Houstons who would be asserting title by adverse possession rather than record title to the property.

Accordingly, the Court finds that the position taken by those parties was not unreasonable under law or fact, that this case was a question in which serious factual issues were presented, that if those factual issues had been decided in the other way that a completely different set of laws would [p. 16] have been applied and, accordingly, that the parties were entitled to take the positions that they did without incurring Rule 11 sanctions. The motion for Rule 11 sanctions is denied.

The Court, accordingly, will enter a final judgment adjudicating the Houstons to be the sole owners of Stack Island, that it lies in Mississippi, and that the title thereto is quieted as against all of the parties in the lawsuit opposed to the Houstons.

Because of the complexity of the legal description, I will ask Mr. Bailess as the prevailing party to prepare a proposed final judgment including whatever you feel is necessary to place in your judgment for title purposes. You may make any necessary statement which will make that judgment recordable for land deed purposes.

I will ask that the judgment be presented to the attorneys opposite for criticism or comment before it is presented to the Court.

The Court did not specifically address Mr. Sedrick Banks, the successor to Bess Purdy, deceased. The Court notes that Mr. Bailess on behalf of the Houstons apparently conceded that Rule 11 sanctions would not be properly assessed against that succession or estate.

That will conclude the bench opinion by the Court.

I will ask the parties represented as to whether there [p. 17] is any request for additional adjudication by the Court or clarification of any ruling by the Court.

Mr. Bailess for the Houstons?

MR. BAILESS: Your Honor, if the Court please, you covered a great deal. I think I understand what the Court did. I can't think of anything right now.

One small point of clarification. Which attorneys do I have to run this order by?

THE COURT: All right.

MR. BAILESS: Would it be Mr. Keyser and Mr. Adams? Or do I also need to run it by Mr. Fox and Mr. Wyly and Mr. Banks?

THE COURT: Is there any request from either Mr. Banks, Mr. Fox, or Mr. Wyly to review the judgment?

MR. BANKS: No, sir, I'd waive any request of succession that Bess Purdy may have.

MR. FOX: No, Your Honor.

MR. WYLY: No, Your Honor.

THE COURT: All right.

MR. WYLY: I would like to ask one thing.

THE COURT: Just a minute. Let me take this in order.

Mr. Bailess, you will only be required to submit it to Mr. Keyser and Mr. Adams. The other attorneys do not wish you to submit it to them.

[p. 18] MR. BAILESS: Thank you, Your Honor. One thing that either I am confused about or the Court was confused about is the motion to set aside the default judgment. And I think that the only motion that was filed to set aside a default judgment was filed by Mr. Wyly on behalf of Mr. Surles, Gladstone Corporation, and the Wyly interests. I could be wrong about that.

MR. WYLY: According to if it's in order, I ask that those motion [sic] to be set aside be withdrawn.

THE COURT: Would you simply withdraw those motions?

MR. WYLY: Yes, sir.

THE COURT: All right. The withdrawal -

MR. WYLY: That will clarify his problem; will it not?

THE COURT: Yes, sir, the withdrawal of those motions will be permitted and that will render moot the motion to set aside. I had understood in our telephone conversation last week between Mr. Bailess and Mr. Keyser that there had been a motion by Mr. Keyser on behalf of his clients to set aside default judgments; is that not true?

MR. BAILESS: No, Your Honor. I was just informing the Court that that was one motion that had been filed but which had never been disposed of. It was actually filed by Mr. Wyly.

[p. 19] THE COURT: I have granted that withdrawal and that moots that issue. Accordingly, the Court simply states that the comments made in the bench opinion concerning the motion to set aside the default judgments is deleted. They will not actually be taken out of the transcript but it should be considered as though they had not been mentioned.

MR. BAILESS: Thank you, Your Honor.

THE COURT: All right. Mr. Keyser, any request for additions or clarifications?

MR. KEYSER: No, sir. I don't have any.

THE COURT: Mr. Adams?

MR. ADAMS: No, sir.

THE COURT: All right. Mr. Wyly?

MR. WYLY: I would like to ask if the Court would have the boundaries marked so that all parties concerned, the line and the boundaries will be marked.

THE COURT: All right. Mr. Wyly. I will decline that request. I think that it is up to the land owners to mark a boundary and that the Court should not require that to be done. The Court has ruled in the first phase of this trial as to the exact geographical calls constituting that boundary. And if at the conclusion of these proceedings some party wishes to expend the money to have a surveyor mark that boundary in accordance with those calls, certainly whoever wishes that done can do so. I will not require that.

[p. 20] All right, Mr. Banks?

MR. BANKS: Your Honor, I'm kind of a small fish in a big pond here, but the best I can figure it out, the succession has some three or four acres interest in this island that was in dispute. My question would be, has the Court determined what costs, if any, the Defendants are liable for?

THE COURT: I have not but I will address that in just a moment.

Mr. Fox, any request for clarification or additions from your clients?

MR. FOX: No, Your Honor.

THE COURT: All right. Let me address the issue of costs. I'm sure that Mr. Bailess as the prevailing party is interested in that.

This Court understands that in the matter of costs in Federal Court that there is considerable discretion on the Judge's part as to which costs to assess to a prevailing party. Normally the only costs which I assess are the filing fees and any witness costs that were actually expended for subpoenaed witnesses. I do not normally allow as costs things that appear on the printed costs bill for depositions, costs of copies, and such matters as that.

I would suggest to everyone that probably the most equitable way to assess costs under the circumstances would [p. 21] be to assess them against the State of Louisiana and the Lake Providence Port Commission as the primary parties who were protesting the lawsuit, particularly in regard to the positions taken by the individual Defendants that basically once the litigation started they turned their interests over to the State of Louisiana.

Accordingly, the Court will assess the costs in favor of the Plaintiffs only against the State of Louisiana and the Lake Providence Port Commission.

And then, Mr. Bailess, you may be guided by my remarks in regard to whatever costs you might wish to claim. I will not rule on that at this time. You may make your claim by a proper bill of costs in any form or fashion that you wish. I will rule on that at a later point if called upon so to do.

All right. Anything further from anybody?

The Deputy Clerk was missing a couple of exhibits in the record. I understand that she called you, Mr. Keyser. I believe they were Louisiana exhibits.

MR. KEYSER: Yes, sir. We had talked about it earlier today. She's still missing Louisiana 20 and 30 and I had assumed she had found them when I hadn't heard back from her and I didn't find them in my stuff. I will endeavor to get copies of them.

THE COURT: You need to have the record complete, particularly if someone wishes to take an appeal. She did [p. 22] not have those after the last hearing. We had a large number of exhibits and it was fairly complicated.

Mr. Keyser, let me ask you to be responsible either for finding those original exhibits or providing us with copies.

MR. KEYSER: Yes, sir.

THE COURT: All right. I will ask the attorneys before we leave this afternoon to please help the Courtroom Deputy with the exhibits to make sure while you are all here that the exhibits are in proper order.

The Court has made this bench opinion. In the event it is transcribed for appeal or other purposes, the Court will reserve the right to edit or amend this bench opinion. The Court, however, will not change the end results of the opinion by any such editing or amending.

If there is nothing further then the Court will stand in recess.

(Recess.)

[p. 23] * * *

CERTIFICATE

I, Celeste O. McClelland, Registered Professional Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 22 pages contain a full, true, and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 13th day of October, 1989.

/s/ Celeste O. McClelland
Celeste O. McClelland

My Commission Expires:
June 29, 1991

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, RUTH HOUSTON
BAKER and HINES H. BAKER, JR., CO-EXECUTORS
AND CO-TRUSTEES OF THE ESTATE OF GEORGE T.
HOUSTON a/k/a GEORGE T. HOUSTON, III,
DECEASED; AND RUTH HOUSTON BAKER,
INDIVIDUALLY

PLAINTIFFS

VS. CIVIL ACTION NO. W86-0080(B)

RUTH M. THOMAS, DECEASED; BESSIE PRICE
TALBERT PURDY, DECEASED; MRS. EDITH P.
HOUSTON; EDMOND SUSAN BELL FOLK; SARAH
ANN SCHNEIDER BOTKIN; SARA ANN SCHNEIDER
MOTT; FREDERICK HALL SCHNEIDER, III; GAY
SCHNEIDER WARREN; NANETTE SCHNEIDER
MILLER; LISA M. MILLER; OWEN S. BROWN, JR.;
MARY VIRGINIA BROWN; WILLIAM F. NAFF; JOHN
O. NELSON, JR.; TOM ED NELSON; ALBERT P.
SURLES, JR.; WALTER ELVIS SURLES; ALBERT P.
SURLES; HAZEL T. WHITE; ELIZABETH DELONEY
REED; VAIL DELONY BALDRIDGE; ELIZABETH
LOUISE MILLER DELONEY, ADMINISTRATRIX OF
THE SUCCESSION OF VAIL M DELONY; GENEVIEVE
BROWN SHORTER, DECEASED; CHARLIE BUTLER;
BETTYE JOE SHORTER PRINCE; FRED ROGERS
SHORTER; WILLIE B. SHORTER; EDWARD LEO
SHORTER; SAM L. HOUSE, JR.; MILDRED A. HOUSE;
SAM THOMAS BATTON; AUDREY H. BATTON;
GLADSTONE CORPORATION; ANNIE ROSE W.
GILFOIL; JAMES HENRY GILFOIL, III; WILLIAM D.
BROWN, III; GRADY WYLY BROWN; PHILIP B.
BROWN; JAMES GRADY WYLY, JR.; ANNIE ETHEL
WYLY; WILLIAM NORRIS WYLY; BONNIE G. WYLY;

HOLLYBROOK LAND COMPANY, INCORPORATED;
ED M. LOWRANCE, TRUSTEE FOR HELEN C.
LOWRANCE; HELEN C. LOWRANCE; OGDEN
RUSSELL; KATHLEEN P. RUSSELL, DECEASED;
FEDERAL DEPOSIT INSURANCE CORPORATION;
THE UNKNOWN HEIRS AT LAW OR DEVISEES OF
SAM ERNEST SHORTER; THE UNKNOWN HEIRS AT
LAW OR DEVISEES OF SAM EARL SHORTER; THE
UNKNOWN HEIRS AT LAW OR DEVISEES OF SAM
SHORTER, JR.; THE UNKNOWN HEIRS AT LAW OR
DEVISEES OF ELLA N. BELL; NATHANIEL W.
THOMAS; FRANK M. THOMAS; COLLINS S.
THOMAS; SAM DONALD JR., EXECUTOR OF THE
SUCCESSION OF BESSIE PRICE TALBERT PURDY;
MARTHA CECILIA RUSSELL REED, INDIVIDUALLY
AND AS CO-GUARDIAN OF THE PERSON AND
ESTATE OF OGDEN "SONNY" RUSSELL; LYNN
OGDEN RUSSELL, INDIVIDUALLY AND AS CO-
GUARDIAN OF THE PERSON AND ESTATE OF
OGDEN "SONNY" RUSSELL; BOARD OF
COMMISSIONERS FOR THE FIFTH LOUISIANA
LEVEE DISTRICT

DEFENDANTS

STATE OF LOUISIANA AND
LAKE PROVIDENCE PORT COMMISSION

INTERVENORS
AND THIRD PARTY PLAINTIFF

STATE OF MISSISSIPPI

THIRD PARTY DEFENDANT

JUDGMENT

(Filed Dec. 13, 1989)

THIS CAUSE having come on for trial before the
Court without a jury on October 2, 1989, this hearing

being the second phase of the trial of this cause, the trial being bifurcated by the Court to first determine whether the property which is the subject of this litigation is located within in the State of Mississippi or in the State of Louisiana, to determine whether or not this Court had jurisdiction of the property, and to determine the application of state law. This Court has previously determined in the earlier hearing that the property which is the subject of this litigation is located in the State of Mississippi. The Court has heard testimony and argument of counsel in this the second and final phase of this litigation, and at the conclusion of said hearing, the court rendered its ruling from the bench on October 2, 1989, and in accordance with said bench ruling, the Court finds as follows:

1. This Court had earlier ruled that the property known as Stack Island moved downstream and to the West by virtue of the natural processes of the Mississippi River. This action eliminated the claim that the subject property constituted accretions of the State of Louisiana. Having so ruled, the only issue left to be decided by this Court is that of adverse possession of the property known as Stack Island.

2. Legal title to the subject property is in the name of Plaintiffs. All parties have agreed that the burden of proof is on the Louisiana riparian owners to prove any title they may have by adverse possession.

3. The Court has heard testimony from Elizabeth D. Reed, Mrs. Vail Deloney, Joe Oliveros, Mike Murray, Joe Chapman and Billy Murray. The testimony offered by the Defendants, Intervenor does not meet the burden of proof required of them. There is no testimony of any

adverse possession East of the State boundary line as set by this Court. In order to prove adverse possession, the Defendants and Intervenor were required to prove possession that is hostile and under claim of right, actual, open, notorious and visible, exclusive, continuous and uninterrupted and peaceful.

4. At the earlier hearing of this cause in June, 1989, the Plaintiffs offered proof of possession of the subject property by the Plaintiffs as follows:

(a) Eyreal "Jelly" Higgins testified that he grazed cattle on Stack Island and observed that the Houstons had planted cottonwood trees. Jelly Higgins kept trespassers off of Stack Island and kept the property posted.

(b) Charles Shelton testified that he hunted on Stack Island as a boy. Further, he kept Stack Island posted as president of the hunting club on Stack Island.

(c) James Kelly confirmed that the Houstons planted cottonwood trees on Stack Island.

(d) Ralph Polk testified that he saw the Houstons on Stack Island and on several occasions transported Ted Houston to Stack Island.

(e) A. M. "Horsefly" Higgins testified that in the 1950's he leased all of Stack Island for grazing purposes. He was represented by attorney Captan Jack Wyly in executing this grazing lease on Stack Island. Captan Jack Wyly testified that as a Louisiana riparian owner he claimed no Mississippi land.

The State of Louisiana and the Lake Providence Port Commission offered as a witness Randy Walters, the

Executive Director of the Lake Providence Port Commission, who testified that dredging was done in the Hagan Chute to keep the Port Commission channel open. He also testified that barges tied to the east bank of the Chute. This testimony does not establish any possessory rights in the Lake Providence Port Commission.

5. The Plaintiffs are the record title owners of Stack Island being that part east of the state boundary line as set by the Court by Judgment dated July 3, 1989.

6. No Defendant or Intervenor has met the burden of proof to establish any property rights in Stack Island.

7. The Plaintiffs are entitled to final judgment quieting title to Stack Island.

8. The Plaintiffs' Motions to Strike Counterclaims of the various Defendants are denied.

9. The Motions for Substitution of Parties as filed by the State of Louisiana and the Lake Providence Port Commission are granted.

10. The Plaintiffs' Motions for Sanctions are denied.

11. All court costs are assessed against the State of Louisiana and the Lake Providence Port Commission, for which Plaintiffs may make claim by proper bill of costs.

12. Judgment is hereby entered adjudicating that:

(a) Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr. as Trustees of the Julia Donelson Houston Marital Trust are the fee simple owners of an undivided three-sixteenths ($\frac{3}{16}$) interest, and that Julia Donelson Houston, Ruth Houston Baker and Hines H.

Baker, Jr. as Trustees of the George T. Houston Estate Trust are the fee simple owners of an undivided nine-sixteenths ($\frac{9}{16}$) interest, and that Ruth Houston Baker is the fee simple owner of an undivided one-fourth ($\frac{1}{4}$) interest in and to the property hereinafter described lying North of the North line extended Westward of that certain tract of land known as "Shipland"; and

(b) Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr. as Trustees of the Julia Donelson Houston Marital Trust are the fee simple owners of an undivided one-eighth ($\frac{1}{8}$) and that Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr. as Trustees of the George T. Houston Estate Trust are the fee simple owners of an undivided three-eighths ($\frac{3}{8}$) interest each in and to only the oil, gas and other minerals lying in, on and under the land hereinafter described, lying South of the North line extended Westward of the certain tract of land known as "Shipland"; and

(c) Ruth Houston Baker is the fee simple owner of the lands hereinafter described lying South of the North line extended Westward of that certain tract of land known as "Shipland", subject to the ownership of an undivided one-half ($\frac{1}{2}$) interest [described above in 12(b)] in and to the oil, gas and other minerals lying in, on and under said property.

Further, this Court finds that none of the Defendants or Intervenor have any right, title or interest in said lands and this Court removes and cancels all clouds heretofore existing on the title of Plaintiffs in and to said property as against all claims of the Defendants and Intervenor.

13. The property of Plaintiffs is described as follows, to-wit:

That certain island in the Mississippi River known as Island No. 94 and also known as Stack Island, being sometimes also called Section 27 of Township 11 North, Range 9 West, Issaquena County, Mississippi, being the same island, with accretions which have been added thereto, which was conveyed by the United States of America to Stephen B. Blackwell by Patent dated December 29, 1888 and recorded in Book S at Page 444 of the Land Records of Issaquena County, Mississippi. The West boundary of said lands, which is also the East boundary of the lands in the State of Louisiana, is described by geodetic positions of the vertexes, numbered Point 1 through Point 21, and described as follows:

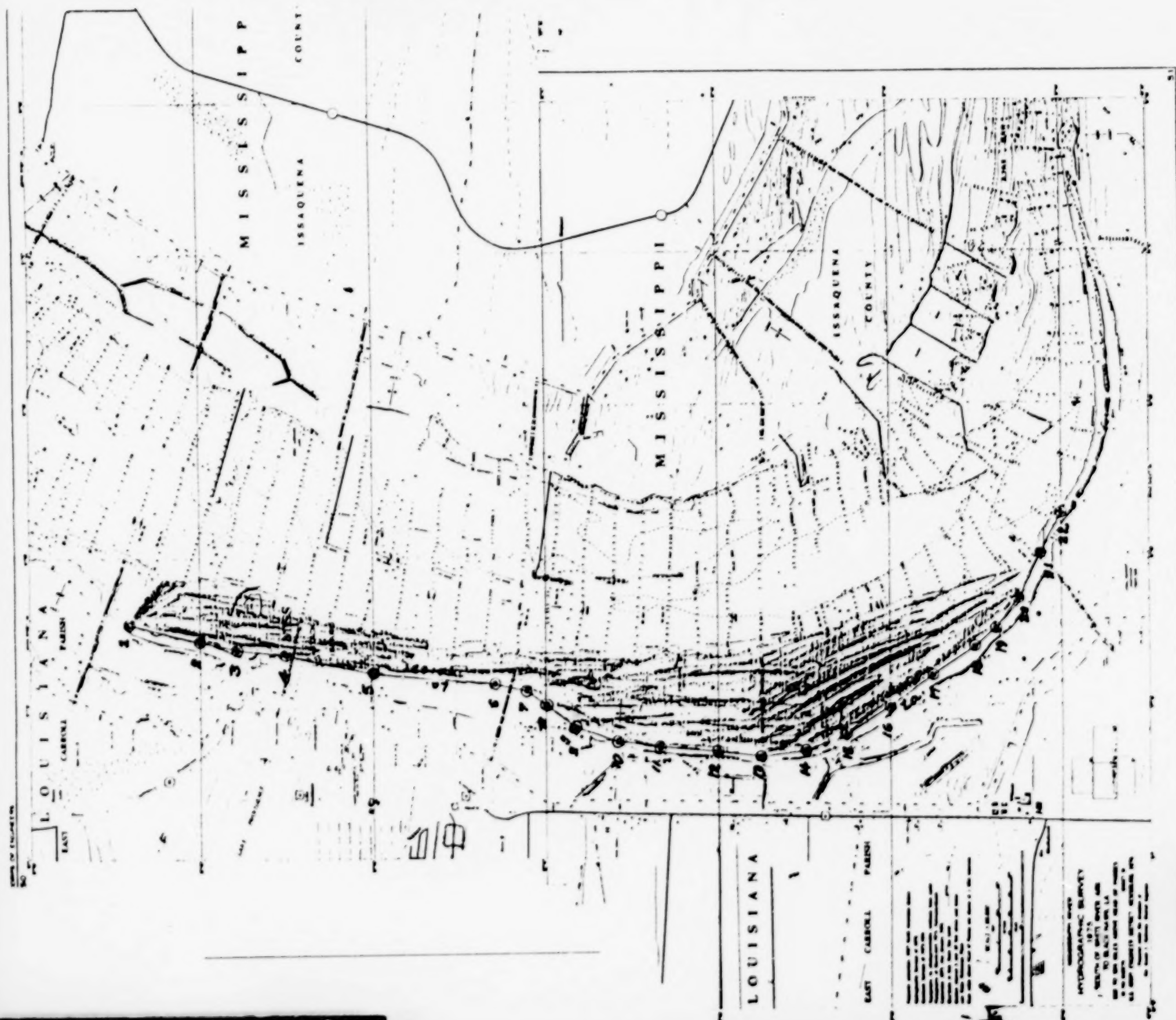
Beginning at Pt. 1 at North Latitude 32° 49' 25" and West Longitude 91° 09' 27", said Pt. 1 being at the foot of the West bounds of Baleshed Towhead, Mississippi and the head of the West bounds of Stack Island, Mississippi, which was fixed along the thalweg of the abandoned Mississippi River Channel in about 1954, thence Southward with the fixed thalweg (marking the Mississippi - Louisiana boundary) in the abandoned sector of Lake Providence Bend channel at Pt. 2, Latitude 32° 49' and Longitude 91° 09' 34"; thence to Pt. 3, Latitude 32° 48' 47" and Longitude 91° 09' 37"; thence to Pt. 4, Latitude 32° 48' 30" and Longitude 91° 09' 39"; thence to Pt. 5, Latitude 32° 48' and Longitude 91° 09' 47"; thence to Pt. 6, Latitude 32° 47' 18" and Longitude 91° 09' 51"; thence to Pt. 7, Latitude 32° 47' 6" and Longitude 91° 09' 54"; thence to Pt. 8, Latitude 32° 47' and Longitude 91° 09' 59"; thence to Pt. 9, Latitude 32° 46' 50" and Longitude 91° 10' 7"; thence to Pt. 10, Latitude 32° 46' 35" and Longitude 91° 10' 14"; thence to Pt. 11, Latitude 32° 46' 20" and Longitude 91° 10' 16";

thence to Pt. 12, Latitude 32° 46' and Longitude 91° 10' 18"; thence to Pt. 13, Latitude 32° 45' 45" and Longitude 91° 10' 20"; thence to Pt. 14, Latitude 32° 45' 30" and Longitude 91° 10' 18"; thence to Pt. 15, Latitude 32° 45' 15" and Longitude 91° 10' 12"; thence to Pt. 16, Latitude 32° 45' and Longitude 91° 10' 01"; thence to Pt. 17, Latitude 32° 44' 45" and Longitude 91° 09' 49"; thence to Pt. 18, Latitude 32° 44' 30" and Longitude 91° 09' 38"; thence to Pt. 19, Latitude 32° 44' 23" and Longitude 91° 09' 30"; thence to Pt. 20, Latitude 32° 44' 15" and Longitude 91° 09' 18"; thence to Pt. 21, Latitude 32° 44' 07" and Longitude 91° 09'; thence to Pt. 22, Latitude 32° 44' and Longitude 91° 08' 44"; said Pt. 21 marks 1975 downstream bounds of Stack Island fixed thalweg (Fixed Interstate Mississippi - Louisiana boundary) and the beginning of the 1975 live thalweg (Live Interstate, Mississippi - Louisiana boundary).

14. This Judgment, along with a copy of the plat of Exhibit P-32D, which said Exhibit P-32D is attached to this Judgment as Appendix A, may be recorded in the Land Records of Issaquena County, Mississippi and in the office of the Clerk of Court of East Carroll Parish, Louisiana.

SO ORDERED AND ADJUDGED, the 13 day of Dec., 1989.

s/ William H. Barbour, Jr.
UNITED STATES
DISTRICT JUDGE



BEST AVAILABLE COPY

No. [114] Original

**In the
Supreme Court of the United States**

October Term, 1988

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

**MOTION TO FILE COMPLAINT, COMPLAINT
AND APPLICATION FOR STAY ORDER,
AND BRIEF IN SUPPORT OF MOTION,
COMPLAINT AND APPLICATION FOR
STAY ORDER**

WILLIAM J. GUSTE, JR.

Attorney General

State of Louisiana

State Capitol

Baton Rouge, Louisiana 70804

GARY L. KEYSER

DAVID C. KIMMEL

Assistant Attorneys General

State of Louisiana

No. [114] Original
In The
Supreme Court of the United States
 October Term, 1988

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT
AND FOR STAY ORDER

The State of Louisiana, appearing herein through the Honorable William J. Guste, Jr., its Attorney General, acting in pursuance of the authority and powers vested in him by Article IV, Section 8 of the Louisiana Constitution, respectfully states that:

1. A portion of the boundary between the States of Louisiana and Mississippi common to the Parish of East Carroll, Louisiana, and the County of Issaquena, Mississippi, is in dispute.
2. This boundary dispute between the States is subject to the exclusive original jurisdiction of the Supreme Court of the United States.
3. An action is presently pending in the United States District Court, Western Division of the Southern District of Mississippi, entitled *Julia Donelson Houston, et*

al, vs. Ruth M. Thomas, et al., Civil Action No. W86-0080(B), wherein, as shown by Exhibit "A", the Complaint to Remove Cloud, complainants in said civil action are claiming ownership of a portion of lands involved in

* * *

No. [114] Original
In The
Supreme Court of the United States
 October Term, 1988

STATE OF LOUISIANA,

Plaintiff.

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

COMPLAINT AND APPLICATION FOR
STAY ORDER

* * *

[p. 11] XVIII.

Consequently, in the necessary and essential exercise of sovereign rights, the exact location of the boundary line between Mississippi and Louisiana in the area at controversy becomes of major and substantial significance to the respective states, in view of the great value

of the lands and water bottoms for navigational, hunting, fishing, timber and recreational purposes, as well the potential for the production of oil, gas and other minerals. Heretofore, it has not been necessary to determine with [p. 12] preciseness the exact location of such boundary line. This controversy now makes such a determination essential to the two sovereign states, as well as to their citizens.

XIX.

The property rights, the sovereign rights and the sanctity of the boundary between the States of Louisiana and Mississippi are inextricably involved in the private litigation which commenced this controversy, thus instituted and pending in the United States District Court for the Western Division of the Southern District of the State of Mississippi, and said Court is not the forum proper to such determinations. Nor is the State of Louisiana required to submit its title to said court, nor should it be.

XX.

The decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described. The suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, et al.*, should be stayed by Order of this Court until a final judgment herein can be had, and application is hereby made by the State of Louisiana for an Order to be issued by this Court,

directed to the United States District Court, Western Division of the Southern District of Mississippi, staying all proceedings in said suit.

XXI.

The jurisdiction of the Supreme Court of the United States in boundary disputes between States is exclusive and original and accordingly it is appropriate that the suit of *Julia Donelson Houston, et al. vs. Ruth M. Thomas, [p. 13] et al.*, be stayed and all parties thereto be served with a copy of the Stay Order herein applied for, and be given the opportunity to assert such interests as they may have in this action.

WHEREFORE, PREMISES CONSIDERED.

* * *

BRIEF OF THE STATE OF LOUISIANA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL SUIT AND FOR STAY ORDER.

[p. 16] II.

THE MOTION FOR LEAVE TO FILE SHOULD BE GRANTED

Jurisdiction vests since this is a suit between the States of Louisiana and Mississippi in which private persons are also proper parties due to the nature of the boundary dispute.

The value of the property involved in [sic] great. The rights of the State of Louisiana are real and substantial.

The controversy exists and is justiciable. The Supreme Court of the United States is the only forum to settle this dispute, fix the boundary line between the states, and determine finally the rights of the parties. See *Florida v. Georgia*, 17 How. 478 (1854); *Oklahoma v. Texas*, 158 U.S. 574, 66 L.Ed. 771, 42 Sup. Ct. 406 (1922).

This court has entertained jurisdiction in such controversies on numerous occasions, and has done so in several prior Mississippi River boundary cases between Louisiana and Mississippi, as in *Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913, 26 S.Ct. 408 (1906); *Louisiana v. Mississippi*, 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197 (1931); and *Louisiana v. Mississippi*, 384 U.S. 24, 16 L.Ed. 2d 330, 86 S.Ct. 1250 (1966).

* * *

No. 114, Original

**In the Supreme Court of the United States
OCTOBER TERM, 1988**

STATE OF LOUISIANA,
Plaintiff,

vs.

STATE OF MISSISSIPPI, ET AL.,
Defendants.

**BRIEF IN OPPOSITION TO
MOTION FOR LEAVE TO FILE COMPLAINT**

MIKE MOORE, Attorney General
State of Mississippi

ROBERT E. SANDERS
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Telephone: (601) 636-6565

Attorneys for Defendants

November, 1988

E. L. MENDENHALL, INC.,
926 Cherry Street, Kansas City, Mo. 64106,
(816) 421-3030

* * *

[p. 6] Mississippi. All necessary and indispensable parties are before the Court.

Here, Louisiana has an adequate forum to present its claims – the United States District Court for the Southern District of Mississippi – where the same issues are before the District Court. Louisiana chose its forum to litigate the issues. Louisiana intervened as a party in a District Court suit – a suit that was simply an action to remove cloud on title.

Houston brought the suit to establish the boundary line to their land. It is incidental that the boundary line is also alleged to be the State line. The boundary line could have been an established roadway or an inland stream.

A denial of the Louisiana motion would work no irreparable harm upon Louisiana, would avoid further glutting the docket of this Court, and would avoid the expense and delay occasioned by the appointment of a Special Master. The last action of this nature filed by Louisiana, in which a Special Master was appointed to try the issues, resulted in a cost to the parties for the fees of the Special Master alone in excess of \$64,000.00. *Louisiana v. Mississippi*, 466 U.S. 921, 80 L.Ed.2d 175, 104 S.Ct. 1701. These judicial economics are particularly important as the proceedings were begun in the United States District

Court in July, 1986. The proceedings are ready to proceed to trial before the District Court.

Here, justice is far better served by a trial in the lower court, with appropriate review, than by a trial before a Special Master whose rulings this Court simply cannot consider with the care and attention it should.

[p. 7] In the event any parties are dissatisfied with the result reached by the United States District Court, they have the recourse of the normal appellate process of federal courts, including the review in this Court on Writ of Certiorari.

CONCLUSION

For these reasons, the Court should deny the Motion for Leave to File Complaint and should remit the case to the United States District Court for the Southern District of Mississippi, Western Division, for further proceedings.

Respectfully submitted,

MIKE MOORE, Attorney General
State of Mississippi

By: ROBERT E. SANDERS
(Counsel of Record)
Special Assistant Attorney General
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88a

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Attorneys for Defendants

89a

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 3, 1988

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

Gary L. Keyser, Esquire
Assistant Attorney General
State Capitol
Baton Rouge, LA 70804

Re: State of Louisiana v. State of Mississippi, et al.
No. 114, Original (Application No. A-239)

Dear Mr. Keyser:

The Court today entered the following order in the above-entitled case:

"The application for stay of proceedings in the United States District Court for the Southern District of Mississippi in the case of Julia Donelson Houston, et al. v. Ruth M. Thomas, et al., C.A. No. W86-0080(B) presented to Justice White and by him referred to the Court is denied."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson
Chief Deputy Clerk

kb

cc: The Honorable Buddy Roemer, Governor of Louisiana
 The Honorable Ray Mabus, Governor of Mississippi
 The Honorable Michael Moore, Attorney General of Mississippi
 Robert R. Bailess
 George F. Fox, Jr.
 Archie L. Jefferson
 William F. Naff
 Hines H. Baker, Jr.
 M. E. Ward

[Reported at 488 U.S. 808]

No. 114, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Motion for leave to file bill of complaint denied. [For earlier order herein, see *ante*, p. 808.]

JUSTICE WHITE, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

Louisiana's complaint against Mississippi is plainly within our original jurisdiction and alleges a boundary dispute with Mississippi, the very kind of a dispute that countless times the Court has accepted and adjudicated under its original jurisdiction. Furthermore, as 28 U.S.C. §1251(a) prescribes, the Court has exclusive jurisdiction over controversies between States. No other court may entertain Louisiana's complaint against Mississippi.

It is true that Louisiana intervened in a dispute between private parties over the ownership of land on an island in the Mississippi, claiming that the land was in that State. That suit might settle the dispute among the parties and the State, but a judgment that the island is in Louisiana would not bind Mississippi. For that reason, I suppose, Louisiana filed a third-party complaint against Mississippi and also sought leave to file an original action in this Court. We prefer to have disputes within our original jurisdiction settled in other fora where possible. See, *e.g.*, *Arizona v. New Mexico*, 425 U.S. 794 (1976). But this boundary dispute between two States is exclusively our business and as such, may not be adjudicated in the District Court. Had Louisiana not intervened in the private action, denying leave to file would surely be indefensible. Perhaps denial of leave to file rests on the possibility that the private action will go forward with Louisiana as a party and that a judgment unfavorable to,

but binding on Louisiana will be entered. For me, however, this is no way to treat a sovereign State that wants its dispute with another State settled in this Court. I would grant leave to file.

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543**

February 27, 1989

JOSEPH F. SPANIOL, JR.,

CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Gary L. Keyser
Asst. Attorney General
State of Louisiana
P.O. Box 94095
Baton Rouge, LA 70804-9095

Re: Louisiana v. Mississippi, No. 114 Original

Dear Mr. Keyser:

The Court today entered the following order in the above-entitled case:

"The petition for rehearing and alternative motion to file a separate complaint is denied."

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

By:

Francis J. Lorson
Chief Deputy Clerk

lg

cc: Al Nusso,
Asst. Attorney General of Mississippi
Robert R. Bailess, Esq.
George F. Fox, Jr., Esq.
Archie L. Jefferson, Esq.
William F. Naff
Hines H. Baker, Jr., Esq.
M. E. Ward, Esq.

[Reported at 489 U.S. 1050]

No. 114 Original

In the
Supreme Court of the United States
 October Term, 1988

STATE OF LOUISIANA,

Plaintiff,

v.

STATE OF MISSISSIPPI, ET AL.,

Defendants.

**PETITION FOR REHEARING BY THE STATE OF
 LOUISIANA OF ITS MOTION TO FILE
 COMPLAINT; AND ALTERNATIVE MOTION TO
 FILE SEPARATE COMPLAINT AND
 BRIEF IN SUPPORT**

WILLIAM J. GUSTE, JR.
 Attorney General
 State of Louisiana
 State Capitol
 Baton Rouge, Louisiana 70804

GARY L. KEYSER
 DAVID C. KIMMEL
 Assistant Attorneys General
 State of Louisiana

* * *

[p. 2] 2.

The property rights, the sovereign rights and the location of the boundary between the States of Louisiana and Mississippi, all important legal issues, are involved in the litigation which commenced this controversy in the United States District Court, and said Court is not the proper forum to make such determinations in matters between states. Parenthetically, a judgment by the District Court in this matter would not necessarily bind all parties at issue, particularly as concerns the boundary question and the validity of the original United States patent. The decision of the Supreme Court of the United States in this matter will be conclusively binding on all private parties, as well as the states, and it alone has the power to fix and determine the boundary lines herein described.

* * *

[p. 8] A trial of the case in Jackson, Mississippi, would no doubt give at least the appearance of partiality to some, which a case of this type does not justly deserve.

II.

THE STATES ARE THE REAL PARTIES AT INTEREST

While all of the parties whose presence is indispensable, necessary or proper for the determination of this case between the states are properly involved, the states are the real parties at interest as concerns the location of

their common boundary and the ownership of the water-bottoms which adjoin it. They are not merely representing the interests of their citizens, who have related interests which can be determined at the same time.

* * *

[p. 9] III.

IT IS ESSENTIAL THAT THE SUPREME COURT ASSERT ITS JURISDICTION, AND SUCH IS IN THE INTEREST OF JUDICIAL ECONOMY

While it is possible for the District Court to reach some type of decision affording relief to some of the parties involved, a judgment by the District Court that Island No. 94 is in Louisiana would not bind Mississippi, nor necessarily the numerous private parties involved. Such a judgment would not necessarily deter dual assessment and taxation by the taxing bodies of the two states, nor dissuade both Mississippi and Louisiana claimants from asserting acts of ownership and possession.

A district court decision will, however wise, lead inevitably to an appeal of the case and, thence, certainly to this Court for final resort. Consequently, the time of the appellate court will also be consumed and, ultimately, the time of this Court as well.

It can hardly be imagined that the Supreme Court will not take jurisdiction in a case of this magnitude since it has, as a matter of record, already recognized the essential need for hearing matters of similar kind, while not taking jurisdiction of every possible case. See *State of Louisiana v. State of Texas*, 176 U.S. 1, 16, 44, 44 L Ed 347,

353, 20 S Ct 251 (1899); *Texas v. Louisiana*, 426 U.S. 465, 48 L Ed 2d 775, 96 S Ct 2155 (1976); *Commonwealth of Massachusetts v. State of Missouri*, 308 U.S. 1, 19-20, 84 L Ed 3, 60 S Ct 39 (1939); and *Oklahoma v. Texas*, 258 U.S. 574, 66 L Ed 771, 42 S Ct 406 (1922).

* * *

(3)

No. 91-1158

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

**BRIEF IN OPPOSITION BY THE
STATE OF LOUISIANA AND THE LAKE
PROVIDENCE PORT COMMISSION**

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BRIEF IN OPPOSITION BY THE
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PROVIDENCE PORT COMMISSION

I.

PRELIMINARY STATEMENT

Petitioners correctly state that Louisiana sought to have this Court assume original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. Section 1251(a) (1988). *Louisiana v. Mississippi*, No. 114, October Term 1988. The motion of Louisiana for leave to file a bill of complaint was denied and Louisiana later filed a motion for rehearing and alternative motion to file a separate complaint, which were also denied by this Court.

Since that time, the case has been completely tried in a bifurcated trial in the district court in two separate trial fixings, with the trial court rendering two separate bench opinions and two separate judgments, all of which is contained in the appendix to the petition for writ of certiorari.

Thereafter, the Fifth Circuit reversed and rendered, entering judgment in favor of respondents herein. Petitioners filed a petition for rehearing and a suggestion for rehearing en banc, both of which were denied.

Petitioners have advanced every possible factual and legal argument in the courts below, changing the theory of their case in the petition for rehearing and suggestion for rehearing en banc before the Fifth Circuit. Petitioners continue with this new theory of the case before this Court, but it is insupportable in fact and in law.

II.

STATEMENT OF THE CASE

The Statement of the Case of petitioners is generally correct, with the exception that the reference to "an island located in the Mississippi River" is not a completely accurate description of the land area claimed by petitioners.¹ In truth and in fact, petitioners are claiming the

¹ At pages 2, 3, 4, 5, 6, 7, 8 and 16, the petition for writ of certiorari refers to "an Island", "Stack island" or "Island No. 94". At pages 17 and 18, the disputed accretion is more properly referred to as "the land".

accretion along the west bank of the river at Lake Providence, Louisiana, as will appear from Exhibit A to respondent's Motion to File Complaint, No. 114, Original, that exhibit being petitioners' Complaint Remove To Cloud filed in the district court. Attached to the Complaint To Remove Cloud is a map exhibit which depicts the boundary claimed in paragraph 52 of the complaint, the greater portion of which boundary is drawn essentially along the Louisiana levee, separating the levee from accretion which formed against that westerly bank. The full linear extent of the boundary proposed by petitioners is quite extensive and traverses the river from east to west above the vicinity of Lake Providence to miles below that reach of the river, generally dividing the Louisiana bank and accretions by an artificial boundary drawn by petitioners' "expert".²

The effort of petitioners from the outset has been to suggest that Island No. 94 continues in existence at the same geographic location as it was when first numbered by the Mississippi River Commission. Actually, the formation known as Island No. 94, 117.96 Acres at the time of patent, was numbered long prior to the sovereignty of either Mississippi or Louisiana; disappeared by erosion and was not in existence at the time of sovereignty of either state; did not re-form again until later years; periodically appeared, disappeared and re-appeared in

² The testimony of this expert was rejected by this court in *Louisiana v. Mississippi*, 466 U.S. 96, 80 L.Ed.2d 74, 104 S.Ct. 1645 (1984), as well as by the U. S. Fifth Circuit in the case below, *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), at pages 8a and 11a of petitioners' appendix in this case.

differing locations and in various forms, such as bank accretion, sand bars and actual island formations; did not re-form until 1881 and was not patented out the United States until 1888, long after sovereignty of either state. Thus, its location with respect to the boundary is not relevant until the time of its formation and patent in 1888, as properly found by the court below. These facts are indisputable and are clearly shown by the exhibits in the voluminous record below.

It is to be noted that the Fifth Circuit decision commences with the recitation that:

In a boundary dispute as treacherous as old man river itself, the appellants challenge the district court's conclusion that accretions to the west bank of the Mississippi River are within the territorial boundaries of Mississippi.³

It is submitted that the lower court fully grasped the significance of petitioners' trial strategy, realizing that there were actually two separate geographic locations at issue, each known as the "island" or "Stack Island":

- (1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as "the island" or "Stack Island", as it appears to be an island at extremely high water; and
- (2) The "new" island which has developed at the precise geographic location of original Island No. 94 is known as "Stack Island".

³ *Houston v. Thomas*, *supra*, at 249.

By describing a boundary generally along the Louisiana levee on the west bank of the river, petitioners would be able to capture ownership of both the accretion to the west bank and the new and extremely large island located in the river itself. The accretion to the west bank has been assimilated into the land mass along the west bank, and was so found even by the district court. In its Bench Opinion of June 23, 1989, the court found that this accretion to the "Louisiana shore" is "for large portions of the year completely dry between what is called the island and what is called the high bank on the Louisiana side",⁴ making it a part of the bank.

Petitioners have been claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana and to the "new" Stack Island near Mississippi. Hence, the Fifth Circuit characterization of the boundary dispute as "treacherous".

In the district court and the Fifth Circuit, petitioners have claimed that two avulsions occurred in the Mississippi River in the vicinity of Lake Providence, but failed at trial to present testimony or evidence of either. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established from U.S. Government documents.

Following is a description of the two avulsions claimed by plaintiffs:

⁴ Pet. App. 19a, at 33a-34a

- (1) The enlargement of the east chute channel at Stack Island to the North between 1908 and 1913 is one claimed avulsion; and
- (2) The second avulsion is claimed to have occurred on the westerly shore below Lake Providence between the years 1913 and 1954, as set forth in paragraphs 56 through 58 of the Complaint To Remove Cloud.

Proof of both claimed avulsions is necessary to support the boundary claimed by plaintiffs. Plaintiffs failed to show and Louisiana has clearly refuted the claimed avulsions and shown the proposed boundary to be in error.⁵ Petitioners' expert was unable to support the claimed avulsions with either testimony or documentary evidence.

In the petition for rehearing filed at the Fifth Circuit, petitioners abandoned the unsupported multiple avulsion claims and postulated a new theory concerning the proper location of the interstate boundary with respect to Stack Island, contending that the lower court erred in assuming that 1881 was the critical date, without specifying exactly what date was supposed to be controlling under the circumstances, except to say that "the boundary . . . must be determined . . . at a much earlier time."⁶ The petition for rehearing never states the dates of sovereignty of the states or when or where Stack Island was formed on the purported "critical date."

⁵ See Reply Brief of State of Louisiana and Lake Providence Port Commission, App 33a; *Houston v. Thomas*, *supra*.

⁶ See Petition for Rehearing, page 6; App. 15a.

Petitioners' make factual arguments which have been urged in the lower courts, but which have no merit because they are not based upon facts in the record. It is suggested that the Fifth Circuit committed fundamental error in the application of both the Thalweg Rule and the Doctrine of Acquiescence.

These arguments and the various map exhibits upon which petitioners might seek to rely are addressed in the answer of the State of Louisiana and the Lake Providence Port Commission to the petition for rehearing. Petitioners did not attempt to argue for earlier periods of time prior to 1881, as the "relevant time" until after the decision of the Fifth Circuit.⁷ There is no evidence in the record or otherwise which would support the new theory of the case that "the boundary . . . must be determined . . . at a much earlier time." There is simply no evidence to support any such contention.

Petitioners argue with the decision of the Fifth Circuit and the authorities upon which it is based, contending that it should have looked at earlier periods of time for its determination. As pointed out above, pages 3 and 4, Stack Island was not in existence at the time of sovereignty of either state, although an Island No. 94 was identified sometime prior thereto and later disappeared. Following the time of statehood, formations known as Island No. 94 periodically appeared and disappeared from time to time in differing locations and were shown on various sketches of maps made during reconnaissance

⁷ See Answer of the State of Louisiana and the Lake Providence Port Commission to the Petition for Rehearing, App. 1a.

trips down the Mississippi, and on some surveys, but not east of the main channel as an actual island.

III.

APPLICABLE LAW

At the outset of the litigation in the U. S. District Court for the Southern District of Mississippi, counsel for respondents were gravely concerned that there might not be total adherence to applicable principles of law. A review of the Bench Opinions of the district court contained in petitioners' appendix will show that while cases were cited by the district court, the applicable principles of law for which those cases stand were not followed. The Fifth Circuit correctly followed applicable principles of law and applied them to the facts of this case.

It is suggested at page 7 of the petition for writ of certiorari that the Fifth Circuit committed fundamental error in application of the Thalweg Rule by addressing only evidence from 1881 forward. It is stated that "If Stack Island was east of the boundary channel . . . or . . . if Stack Island was formed thereafter east of the boundary channel, Stack island is a part of Mississippi". (emphasis ours) This language is nothing but misleading innuendo.

As pointed out above, Island No. 94 or Stack Island, as it was sometimes called, disappeared and re-appeared from time to time in various forms and locations, sometimes being nothing more than a low water elevation or sand bar connected to the bank. Any map exhibit which would locate the island in any particular place at any moment in time would not be relevant when the island

later washed away and re-formed in a later period of time, which it did repeatedly. The most relevant and definitive exhibits were those recognized by the Fifth Circuit, particularly, the Mississippi River Commission study complete with hydrographic surveys completed in December of 1881 pursuant to the Congressionally-funded improvement plan for this reach of the river.⁸ There is no contrary evidence in the record of this case or otherwise and the lower court was imminently correct in relying upon this government study.

The court was equally correct in relying upon *Iowa v. Illinois*, 147 U.S. 1, 13 S.Ct. 237, 37 L.Ed. 55 (1893); and *Louisiana v. Mississippi*, 466 U.S. 96, 104 S.Ct. 1645, 80 L.Ed.2d (1984). Simply put, current law dictates that the ordinary downstream course of traffic on the river defines the live thalweg and the thalweg defines the boundary.

Petitioners again use misleading language at page 8 of the Petition for Writ of Certiorari, to wit:

If Stack Island existed at the time of the admission of Louisiana or Mississippi to the Union or prior to 1881, which is clear from the evidence, is undisputed, and is assumed for purposes of the Fifth Circuit's decision, the location of the thalweg in 1881 is irrelevant.

As shown at page 4 of respondents' Answer to the Petition for Rehearing at the Fifth Circuit,⁹ Stack Island disappeared during the great earthquake of 1812, prior to

⁸ *Houston v. Thomas*, *supra*, 937 F.2d 247, at 251.

⁹ App. 1a.

the time of Louisiana's admission later that same year, re-appearing years later, only to be washed away again and re-formed in another location.

Consequently, for petitioners to argue "if Stack Island existed, then the Fifth Circuit decision is in error", is misleading, because there is no evidence in the record to support this contention. Surely, if there were, petitioners would have relied upon it and there would have been no need for respondents to have brought to the court's attention the fact that there was no such evidence, as briefed in respondents' answer to the petition for rehearing in the Fifth Circuit.

On the question of the Doctrine of Acquiescence, petitioners simply restate old arguments, improperly drawn conclusions and unsupported advocacy, just as they have done with the Doctrine of Thalweg. Moreover, petitioners recite various acts indicating acquiescence, each of which was dealt with specifically by the court below, including hunting and fishing by Louisiana residents on the accretion; enforcement of Louisiana wildlife laws on the accretion; and payment of Louisiana taxes on the disputed accretionary lands by Louisiana residents.¹⁰

¹⁰ *Houston v. Thomas, supra*, at 253.

IV.

CONCLUSION

Petitioners state no valid grounds for this court to issue its writ of certiorari in this case. As pointed out above, petitioners conjecture for facts which do not exist and argue that the cited legal principles should be applied to the facts for which they conjecture.

These factual arguments and legal concepts have been considered and quite properly rejected by the court below. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

1a

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1031

JULIA DONELSON HOUSTON, ET AL.
Plaintiff-Appellees

versus

RUTH M. THOMAS, ET AL.
Defendants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI WESTERN DIVISION,
NO. 86-0080(B)

ANSWER OF THE STATE OF LOUISIANA AND
THE LAKE PROVIDENCE PORT COMMISSION,
INTERVENORS-APPELLANTS, TO PETITION
FOR REHEARING OF PLAINTIFFS-APPELLEES

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I. INTRODUCTION

Once again, Appellees plow over exhibits offered in the trial before the U.S. District Court for the Southern District of Mississippi and subsequently considered by this Court on appeal, but offer nothing new. The Petition for Rehearing restates old arguments, improperly drawn conclusions and unsupported advocacy. The facts and applicable law simply do not support the claim of Plaintiffs. The Petition for Rehearing continues to argue theories of law and concepts previously rejected by this Court. It also clings to phrases such as "land in place";

"boundary channel"; and erroneous concepts such as "a chute channel can never be a boundary channel", which has no foundation in fact, science, or law.

Interestingly, Appellees apparently now abandon the unsupported multiple avulsion claims of their expert, Austin Smith, and postulate a new theory concerning the location of the interstate boundary with respect to Stack Island, contending that the Court erred in assuming that 1881 was the critical date. At page 6, it is stated, in part, that "the boundary . . . must be determined . . . at a much earlier time." Later, at page 7, it is contended that the Court must determine where Stack Island was located at the time Louisiana became a state (1812) or where it was formed thereafter "at the critical time." The Petition for Rehearing never states the dates of sovereignty of the states or when or where Stack Island was formed on the purported "critical date."

Counsel for Appellees forgets that the formation known as Island No. 94 or Stack Island was not in existence at the time of sovereignty of either state, did not form until later, periodically disappeared and reappeared in differing locations in various forms, such as bank accretion, sand bars, and actual island formations, and was not patented out of the United States until 1888. Thus, its location with respect to the boundary is not relevant until the time of patent, as properly found by this Court. Basically, Appellees would like to pick a date for a boundary determination more favorable than the patent period of 1881-1888, but were not able to specifically state or support a specific date or period of time.

Appellees dispute and continue to argue the holding of this Court concerning the rule of thalweg, the doctrine of acquiescence, the doctrine of adverse possession and factual findings concerning the payment of property taxes and acts of sovereignty.

The Petition for Rehearing constitutes more of an argument with the decision of this Court rather than any sound basis for the granting of a rehearing so that all of these points may be re-argued. It is submitted that a rehearing of this case would be tedious, time-consuming, costly in terms of the energy and labor of the Court required, and pointless. Appellees state no grounds for a re-hearing; they seek only to re-hash previously rejected arguments and the newly-proposed sovereignty theory for which there is absolutely no factual or legal basis.

II. COMMENT ON APPELLEES' STATEMENT OF FACTS

As stated in the Introduction, Appellees would like to draw the Court's attention to an earlier period of time during which Stack Island might have been east of the legal thalweg in order to make the claim that "once Stack Island is east of the legal thalweg it is land in place and always in Mississippi."

Most of the Petition for Rehearing is devoted to discussing exhibits previously considered by the Court and rejected, and arguing that the Court's analysis is in error and that it failed to understand the cases which it

cited, such as *Missouri v. Kentucky*¹ and *Hogue v. Stricker Land and Timber Co.*², at page 7. Without attempting to discuss Appellees' arguments on each of the exhibits, following is a brief discussion of a few of the exhibits to show that their use in support of a rehearing is utterly without foundation.

In Appellees' "Statement of Facts Necessary To The Argument of The Issues", it is stated that P-1, the 1826-27 U.S. Survey, is the earliest evidence *in the record* showing the location of Stack Island (emphasis ours). This is true, because Appellees did not introduce more relevant maps closer to the time of Louisiana's sovereignty in 1812; such maps would show that Island No. 94 was not in existence at that time. As will be shown at page 5 et seq. below, this map and the others cited by Appellees are not relevant under any theory and do not support the new "time of sovereignty" theory suggested in the Petition For Rehearing.

A more relevant map Appellees might have used would be the 1821 "Map of Reconnaissance of Mississippi River", by Captain H. Young and Captain W.T. Poussin, made of this reach of the river, which clearly shows no Island No. 94 at that time. Sand bars are, however, shown on Louisiana's side of the navigation channel between Islands 93 and 95. See Item 1 in the Appendix.

¹ *Missouri v. Kentucky*, 11 Wall. 395, 78 U.S. 395, 20 L.Ed. 116 (1871)

² *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir. 1934)

Counsel for Appellees might also have selected the 1818 edition of "The Navigator", very near the year of Louisiana's admission into the Union. Island No. 94 did not exist at that time, having been washed away in 1812 by an enormous earthquake or by floods.³ It is quite clear that the island has been "sunk by the earthquake [1812] or swept off by the floods", including the bar which had existed below it. See Item 3 in the Appendix, describing the *disappearance of Island No. 94*.

Mississippi was not admitted into the Union until 1817, being a Territory prior to that time. If the critical date for the location of Stack Island in Mississippi relates to the time of state sovereignty, it would relate to the sovereignty of Mississippi and not Louisiana. Since Stack Island was not in existence at that time, the date of Mississippi's sovereignty would not be relevant. At page 7 of the Petition for Rehearing, counsel for Appellees argues that "where Stack Island was located at the critical time" is decisive. However, counsel never identifies the "critical time".

Consequently, Appellee's argument fails if it is intended to suggest that at the time of Louisiana's sovereignty, Stack Island was surveyed as being within the territory of Mississippi or that it was in Mississippi at the time of its sovereignty. In fact and in law, Island No. 94 did not exist at that time. After its formation in later years, its ownership was in the U.S. government and it

³ See Lloyd's Steamboat Directory, and Disasters On The Western Waters, documenting the great earthquake of 1812 and floods, attached as Item 2 in the Appendix.

was not patented out until 1888. Consequently, its location at the time of patent is the relevant time frame.

Appellees argue that the 1826-1827 U.S. Survey is important and that it shows Stack Island east of the boundary channel. In fact, this government Township Plat was made for *land patent purposes*, does not purport to be a survey of the river, and shows only a *sketched-in* river as the western boundary of the Choctaw Land District (Mississippi). Contrary to Appellees' assertion, no boundary channel is shown. This land district survey does not purport to be a river survey or hydrologic survey in any regard.

Appellees argue that the 1828-29 U.S. Survey clearly shows "no island" on the Louisiana side of the channel. Actually, as in the case of the 1826-1827 Township Plat, the river is only *sketched in* as the eastern boundary of the Land District North of the Red River (Louisiana) and is not a survey of the river at all. No sand bars or islands are shown in this reach of the river.

Appellees argue that the 1867 Meriweather map shows the island located in Mississippi, but that time period is not relevant under Appellees' own theory that the time of Louisiana's sovereignty is "the critical time." Quite importantly, what is argued to be Stack Island in 1867 is merely accretion to the bank and not an island formation at all.

Appellees argue that the 1874 reconnaissance map of Major Suter is important and that it shows Island No. 94 as "land in place", whatever this may mean. Counsel for appellees may not be aware that the Suter survey was merely a "reconnaissance survey" made from the Pilot

House of the boat on which Major Suter was riding downstream, and does not purport to be an accurate survey at all, but, again, only a sketch for the purpose of estimating the costs of improving certain routes along the river.⁴ At that time, as in 1867, the formation previously known as Island No. 94 had become a *low water elevation sand bar* attached as accretion to the bank. It was no longer an island at all and did not show at high water.⁵ The 1879 Suter map is nearly identical, showing the sandy accretion attached to the bank in the 1874 survey to be separated at low water by a chute channel. By 1881, the intervening years of river action had caused the chute channel to develop to such an extent as to carry the main

⁴ The Report of Major Charles R. Suter, Corps of Engineers, dated February 18, 1875, issued from the Engineer Office, United States Army, reporting to Congress concerning its appropriation of \$200,000 for surveys and estimates for the improvement of certain routes recommended by the Senate Select Committee on Transportation Routes to the Seaboard advises that "An engineering party was placed on one of the Government steamers and sent into the field, with instructions to sketch the river carefully from pilot-house of the steamer" It also states that "Although the information obtained by this reconnaissance is not sufficiently detailed or extensive to allow estimates of the cost of the improvement recommended to be made, yet it will, I hope, be sufficient to point out the nature of the improvement required, and the means by which it can be effected." at page 496.

⁵ Reconnaissance Surveys were conducted during the low water months of the year, October, November, December, so as to describe the conditions of the river at the most difficult times for navigation. At high water, many sandbars, shoals and other conditions revealed at low water stages would be obscured by high water and not of significance to vessels on the river, as in the case of Island No. 94.

navigation channel of the river. In fact, as detailed by the Mississippi River Commission's report discussed in the decision of the Court in this case, the river was eroding the bank to such an extent as to threaten to scour away significant land areas, giving rise to the need for dike works to divert the river out of the east channel and away from the bank.

As correctly described by the Court in its opinion of August 5, 1991:

"Thus, the boundary remained frozen in the east channel, where it lay at the time of the patent in 1881, regardless of the nature of any shift in the river's course. Hogue, 69 F.2d at 168.

None of the maps argued by Appellees are in a relevant time period and none support Appellees' new sovereignty theory.

III. COMMENT ON APPELLEE'S LEGAL ANALYSIS AND ARGUMENT

In paragraph II of the Petition For Rehearing, Appellees argue that this Court has misapprehended the law of the rule of the thalweg and the island rule, clearly stating that the Court's analysis is in error and that it failed to understand the very cases which it cited in the support of its decision.

In paragraph III of the Petition for Rehearing, Appellees argue that Mississippi has jurisdiction over Stack Island under the doctrine of acquiescence pursuant to acts of dominion, control and sovereignty, and that Louisiana acquiesced in the exercise of these purported acts of

the State of Mississippi. All of these argument have been previously considered by this Court and rejected.

It is submitted that the Court followed applicable principles of law in its decision and cited the controlling authorities on the relevant issues. Accordingly, the arguments of Appellees for a rehearing should be rejected.

IV. CONCLUSION

Appellees state no grounds for a rehearing and seek only to re-hash previously rejected arguments and the newly-proposed sovereignty theory for which there is absolutely no factual or legal basis. Accordingly, the Petition For Rehearing should be denied.

Respectfully submitted,

THE STATE OF LOUISIANA
AND THE LAKE PROVIDENCE
COMMISSION

Intervenors-Appellants

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Attorney General

BY: /s/ Gary L. Keyser
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CERTIFICATE

I, Gary L. Keyser, attorney of record for the Intervenors/Appellants, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Robert R. Bailess
8th Floor, First National Bank Bldg.
Post Office Box 991
Vicksburg, Mississippi 39181

Robert E. Sanders
Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

This 15th day of October, 1991.

/s/ Gary L. Keyser
GARY L. KEYSER
Assistant Attorney General

APPENDIX

Item

1. Map of Reconnaissance of Mississippi River Made during October, November and December, 1821, by Capt. H. Young and Capt. W. T. Poussin
2. *Lloyd's Steamboat Directory, and Disasters On The Western Waters.*
3. *The Navigator*, 1818



MAP OF HAWAIIAN ISLANDS OF THE HAWAIIAN ISLANDS
 Made during October, November and December, 1923.
 By
 CAPT. E. J. YOUNG, AND CAPT. E. S. ROBERTS
 of the
 GEOLOGICAL SURVEY
 and
 LIEUT. E. J. YOUNG, U.S. ARMY.
 Under the direction of the Board of Engineers.
 Scale of length 1 in. = 1 mile
 Scale of breadth 1 in. = 1 mile

THE NAVIGATOR,

CONTAINING

DIRECTIONS FOR NAVIGATING THE

MONONGAHELA, ALLEGHENY,
OHIO, AND MISSISSIPPI RIVERS;

WITH AN AMPLE ACCOUNT

OF THESE MUCH ADMIRERD WATERS,

FROM THE HEAD OF THE FORMER
TO THE MOUTH OF THE LATTER;

AND A CONCISE

DESCRIPTION OF THEIR TOWNS, VILLAGES,
HARBORS, SETTLEMENTS, &c.

WITH MAPS OF THE OHIO AND MISSISSIPPI

TO WHICH IS ADDED

AN APPENDIX,

CONTAINING

AN ACCOUNT OF LOUISIANA,

AND OF

THE MISSOURI AND COLUMBIA RIVERS,

AS DISCOVERED BY THE VOYAGE UNDER

CAPTS. LEWIS AND CLARK.

FIFTH EDITION.

PITTSBURGH,

PRINTED AND PUBLISHED BY CRAMER & STEAR,

FRANKLIN BLVD. WOOD STREET.

1818.

Wm. McMillan & Co. N.Y.

Nine Mile Reach,

Where you have a beautiful view of the river.

No. 94, Stack or Crow's nest island, 6 miles
below 93.

Has been sunk by the earthquake or swept off by the floods; but just below where it stood, is a high sand bar, an acre with young willows, and is about the middle of the river. This bar may grow into another Crow's, but is not likely, as it is a small bar, and the river here runs hard against the head of the bar, and also against the right bank. A channel right side near to the island, thence draws towards the right land shore.

A creek empties in on the right side just above the two settlements. The Whirls heads run far from this place, on which is a considerable settlement, 40 miles distant, and to which from hence is a cut road. It is thirty miles to Mountbourn's settlement on that river.

Crow's nest is a small island very small and stood in about the middle of the Nine-mile Reach. A large bar had formed just below where the island stood, but it also has given way to the current, and is no more.

15a

90-1031

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1031

JULIA DONELSON HOUSTON,
THE STATE OF MISSISSIPPI, ET AL
Plaintiffs/Appellees

V.

RUTH M. THOMAS, ET AL
Defendants/Appellants

PETITION FOR REHEARING

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I.

STATEMENT OF FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

The 1826-1827 United States survey of Township 11 North, Range 9 West, Issaquena County, Mississippi, Exhibit P-1, is the earliest evidence in the record showing the location of Stack Island. This map clearly shows that in 1826-1827 the island is east of the boundary channel, separated from the Mississippi mainland by a narrow chute and wholly within the jurisdiction of Mississippi.

The 1828-1829 United States survey of Township XXI, Range XIII East, of what is now East Carroll Parish, Louisiana, Exhibit P-2, clearly shows no island in the Mississippi River on the Louisiana side of the boundary channel.

Plaintiffs' Exhibit P-3, which is a map prepared by Meriwether in 1867, without question shows the island located in the jurisdiction of Mississippi. This exhibit shows a chute channel east of Stack Island that is sanded up and not navigable.

The next exhibit in the record in sequence of time is Exhibit P-4. This map, entitled "Reconnaissance of the Mississippi River in 1874", was made pursuant to an 1874 Act of the United States Congress by Major Suter for the United States Corp of Engineers. It clearly shows Stack Island (No. 94) is land in place in Mississippi. The chute channel east of the island is still sanded up. The navigation and boundary channel, as drawn on this map by Major Suter of the United States Corps of Engineers, is located west of Stack Island.

Exhibit P-5 is an 1879 map made by the same Major Suter. This map was made as the blueprint of the plan for the Mississippi River Commission to narrow the channel of the river. It is the drawing used by the MRC in its plans for the project referred to in the 1883 MRC Report. This survey distinctly shows that Stack Island, which is depicted on the map as Island 94, is land in place in Mississippi. There is only a narrow chute channel separating the island from the Mississippi mainland.

Exhibit P-7 is an August, 1881 survey of Public Lands made by the United States Deputy Surveyor pursuant to directions from the General Land Office of the United States. The survey by the U. S. Deputy Surveyor was required in order for public lands to be sold by the United States government pursuant to an 1820 Act of Congress entitled "An Act Making Further Provision for the Sale of Public Lands." This survey was required to patent Stack Island, Island No. 94, as Township 11 North, Range 9 West, Issaquena County, Mississippi. Stack Island is plainly shown as land in place in Mississippi. This survey definitely shows that the boundary channel was west of the island. The Deputy Surveyor's field notes for this survey are Exhibit P-6.

The next exhibit contained in the record in sequence of time is Exhibit P-8 which is Marshall's October-November, 1881 Shore Line survey. This map prepared by Lt. Marshall of the Corps of Engineers in October and November, 1881, as part of the MRC project, clearly shows Stack Island, No. 94, as land in place in Mississippi. The Government navigation lights, which are clearly shown on Exhibit P-8, track the main downstream navigation course downstream from the right bank at

Longwood Landing to the left bank government light between Baleshed Bar and Stack Island; thence west of Stack Island to the government light at All Right on the right bank. Both of the Louisiana expert witnesses declared that navigation lights are determinative of the main navigation course. See pages 674, 679 and 696 of the Transcript. The east chute of the river is obviously not the navigation channel as of October-November, 1881. The chute is certainly not the boundary channel.

The next sequential exhibit is Exhibit P-13. These maps of the topography and hydrography of the Mississippi River were surveys prepared no earlier than October of 1882. Stack Island is a salient feature on these maps. The chute channel was enlarging in the 1882 flood. The boundary channel remained west of Stack Island.

The object of the Mississippi River Commission project during 1882-1883 was to *bring the main channel of the river back* to the west of Stack Island, where the main channel had been located prior to 1882.

Since 1882, Stack Island has remained as land in place and it has not disappeared. See Exhibits P-37-A, P-37-A.1, P-37-B, P-37-B.1. These exhibits are tracings taken from MRC of Corps maps recording the loci of Stack Island during the years of 1882, 1894, 1908, 1913, 1925, 1930 and 1937. Exhibits P-27, P-28, P-29 and P-30 are aerial photographs of the United States Corps of Engineers during the years 1932, 1938, 1941 and 1955.

The United States surveyed Stack Island, Mississippi as public land in 1881 and granted a patent to Stephen B. Blackwell in 1888, which patent related back to the 1881 survey. Exhibit P-41. Louisiana did nothing to contest this

United States patent or the 1881 patent survey for over 100 years.

Mississippi has assessed and collected taxes on Stack Island at least since 1889. Exhibit P-64. Louisiana offered no proof that it assessed or collected any taxes on the disputed lands. Instead, Louisiana only offered proof concerning taxes on the Louisiana mainland. (See Transcript at pages 827-832)

The State Courts of Mississippi have taken jurisdiction over Stack Island in 1937 and again in 1968. Exhibits P-53 and P-58. The United States District Court for the Southern District of Mississippi took jurisdiction over the island in a case that began in 1972. *Houston v. U.S. Gypsum*, 569 F.2d 880 (5th Cir. 1978). Louisiana offered no proof of any of its courts taking jurisdiction over Stack Island.

Mississippi offered proof of acts and recognition of individuals in the area that supported that Stack Island is located in Mississippi. For testimony of witnesses, see pages 46, 81, 97, 137-138, 144-146, 226-229, 242-243, 250 and 252 of the Transcript. Also see Exhibits P-40 through P-65. Louisiana offered untimely proof of recent origin that did not prove anything with regard to the issue of acquiescence. Louisiana offered no proof of deed transfers or other conveyances of Stack Island.

The State of Mississippi granted the disputed lands to Mrs. Stephen B. Blackwell on June 1, 1933 after Stack Island had been sold for taxes and forfeited to the State of Mississippi. Exhibit P-46. Louisiana offered no proof of grants from the State of Louisiana concerning the disputed lands.

No later than 1881, Stephen B. Blackwell was homesteading Stack Island as Mississippi lands. Exhibit P-40. There is no evidence of Louisiana residents residing on Stack Island and there is no evidence of Louisiana residents claiming possession of Stack Island. The Houston interests have owned Stack Island since 1934. Exhibit P-47. A decision by this Court that Stack Island is in Louisiana will deprive the plaintiffs of ownership of the island. See Article 512 of the Louisiana Civil Code.

The State of Louisiana and the Lake Providence Port Commission did not claim Stack Island until 1987 – after the Plaintiffs filed their suit to quiet title. See Exhibit P-82, P-91, P-98, P-112 and Louisiana Exhibit LA-37-A.3 and LA-37-A.1. The Board of Commissioners of the Fifth Louisiana Levee District acknowledged that any islands claimed by Louisiana under the Acts of 1886 and 1908 had disappeared. Exhibits P-102 and P-108. In 1907 Louisiana surveyed all islands belonging to the State of Louisiana. See Exhibits LA-37-A.1 and LA-37-A.3. This survey and the Louisiana case of *State ex rel Board of Commissioners for Fifth Louisiana Levee District v. Capdevielle, State Auditor*, 54 So. 820 (La. 1911) conclusively shows that the State of Louisiana did not own or claim jurisdiction over Stack Island.

II.

THIS COURT HAS MISAPPREHENDED THE LAW OF THE RULE OF THE THALWEG AND THE ISLAND RULE

A.

THE FIRST STEP OF THE COURT'S ANALYSIS IS IN ERROR

This Court states, at page 5131 of the August 5, 1991 Opinion, that it would apply a two-step analysis in

resolving this case. This Court said: "First, we determine which channel constituted the boundary thalweg in 1881." The Court erred in assuming that 1881 was the critical date for this determination. Under clearly established law, the boundary with respect to the island must be determined by the location of the thalweg at a much earlier time. The court erroneously assumed that the *navigation thalweg* in 1881 constituted the *boundary thalweg*. The Court has failed to consider the proper criteria in its determination of the boundary thalweg.

It is obvious from a study of the August 5 Opinion that what this Court actually did was to attempt to determine the location of the *navigation channel* as it existed in 1881-1882. The navigation channel may change, but such changes will not affect the boundary channel around an island.

In order to determine the boundary channel, this Court must follow the law established by *Missouri v. Kentucky*, 11 Wall. 395, 78 U.S. 395, 20 L.Ed. 116 at 118-119 (1871).

"The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836, 3 Stat. at L., 545; 5 Stat. at L. p. 50. And Kentucky succeeded in 1792 (1 Stat. at L., 189) to the ancient right and possession of Virginia, which extended by virtue of these treaties to the middle of the bed of the Mississippi River.

"It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction [sic] of Kentucky rightfully attached

to it. If the river has subsequently turned its course and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not in consequence of this action of the water, change its owner."

Also, see *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir. 1934); *Davis v. Anderson-Tully Company*, 252 F. 681 (8th Cir. 1918); *Commissioners, etc. v. United States*, 270 F. 110 at 113 and 114 (8th Cir. 1920).

In order to properly make its determination, this Court must determine where Stack Island was located at the time Louisiana became a state if it existed at that time, and if not, where it was formed thereafter. It is patently clear that this Court, in making its first determination, never considered any evidence dated prior to December, 1881 to determine where Stack Island was located at the critical time, and instead relied on (1) a November 15, 1883 MRC Report covering a period from December 1, 1882 through November 1, 1883, (2) an 1882 MRC Survey depicting the topography and hydrography of this portion of the river in 1882, and (3) some "hydrographic survey completed in December of 1881."

There is no evidence offered by Louisiana that is dated prior in time to 1882. This Court must, in its decision, accept as uncontroverted all evidence in the record dated prior to December, 1881. These exhibits are P-1, P-2, P-3, P-4, P-5, P-6, P-7 and P-8. An unbiased study of these exhibits mandates that the Court reach the conclusion that Stack Island, also referred to as Island No. 94,

was always located within the jurisdiction of the State of Mississippi. If the river subsequently turned its course, and now runs east of the island, the status of the island was not altered by this change, for the channel which the river abandoned remains, as before, the boundary between the States, and the island does not, in consequence of this action of the water, change its owner. *Missouri v. Kentucky*, supra, at 119, *Hogue v. Stricker Land & Timber Co.*, supra, at 167-168.

At all times in 1881 and at all times prior to 1881, the boundary channel was west of Stack Island. The very quote of the 1883 MRC Report relied upon by this Court at page 5132 of its Ruling in determining the location of the main channel, conclusively shows that the main channel of the river was located west of Stack Island prior to this 1883 Report. The Report clearly says, "The closing of the main channel of the river, which passed between the foot of Baleshed Bar and the head of Stack Island, and bringing it back to the right of Stack Island by a system of deflecting dikes" (emphasis added) If the main channel of the river had not been west of the island prior to the Report, there would be no logical reason for the use of the words "bringing it back" to the west side of Stack Island.

The Court also quotes the Report from page 425 on page 5132. The Report, in each instance referring to the channel east of Stack Island, refers to that channel as the *Stack Island Chute*. A chute channel can never be a boundary channel. The chute channel is the lesser channel of the river that is located wholly within the bordering state - in this case, in Mississippi. The bed of the chute channel is owned by the bordering state - in this, Mississippi.

B.

LOUISIANA HAS ACKNOWLEDGED THAT STACK ISLAND WAS NOT FORMED IN LOUISIANA

Louisiana can only claim jurisdiction over the Island by two methods under the Rule of the Thalweg and the Island Rule:

1. If Stack Island was located in the bed of the river prior to Louisiana's admission as a State.

This obviously was not the case. The United States land survey must definitely placed Stack Island in Mississippi in 1826-1827. See Exhibit P-1. The United States land survey did not place Stack Island in Louisiana. See Exhibit P-2. Instead, the United States General Land Office surveyed Stack Island as Island No. 94 and as Mississippi lands. See Exhibits P-6 and P-7.

2. If Stack Island was formed in the bed of the river in Louisiana after Louisiana became a state.

Louisiana has acknowledged that this did not happen. This is abundantly clear by a studied review of the exhibits of the State of Louisiana.

Exhibit LA-37-A.1 is a Louisiana survey of islands claimed under the jurisdiction of Louisiana in 1907. This survey was performed by Louisiana state engineers in furtherance of Louisiana Act No. 44 of 1886 and Act No. 191 of 1908. The Acts and the claim of the State of Louisiana are clearly defined in the case of *State ex rel Board of Commissioners for Fifth Louisiana Levee District v. Capdevielle, State Auditor*, 54 So. 820 (La. 1911). This case is in the record as Exhibit LA-37-A.3.

Of course, it was clear to the State of Louisiana in 1886 when it passed Act No. 44, and in 1907 when it surveyed islands claimed by Louisiana, that Stack Island was lands that were surveyed into Mississippi in 1826-1827, the subject of an 1881 United States patent survey and the subject of the patent actually issuing [sic] by the United States of America to Stephen B. Blackwell in December, 1888 in accordance with the patent survey. Exhibits P-1, P-6, P-7 and P-41.

III.

THE STATE OF MISSISSIPPI HAS JURISDICTION OVER STACK ISLAND UNDER THE DOCTRINE OF ACQUIESCENCE

Through a long line of cases, the United States Supreme Court has set down numerous criteria which have probative value in the determination of boundary lines between states under the Doctrine of Acquiescence. There are two general areas of proof. The first area is proof by a state of acts of dominion, control and sovereignty over land. The other area concerns the failure of a state to prove or assert any definite claim of right to the land or claim of jurisdiction over the land.

A.

ACTS OF DOMINION, CONTROL AND SOVEREIGNTY BY THE STATE OF MISSISSIPPI

1. Township surveys prepared by the United States of America General Land Office. See *Indiana v. Kentucky*, 136 U.S. 479, 10 S.Ct. 1051, 34 L.Ed. 329 at 333-334 (1890),

Louisiana v. Mississippi, 202 U.S. 1, 50 L.Ed. 913 at 932 (1906).

2. Patents issued by the United States showing property to be in a particular state. See *Louisiana v. Mississippi*, supra, at 933 and *Arkansas v. Tennessee*, 60 S.Ct. 1026, 310 U.S. 563, 84 L.Ed. 1362 at 1365 (1940).

3. Assessment and payment of land taxes. See *Indiana v. Kentucky*, supra, at 335, *Virginia v. Tennessee*, 148 U.S. 503, 37 L.Ed. 537 at 545 (1933); *Louisiana v. Mississippi*, supra, at 933; *Maryland v. West Virginia*, 217 U.S. 1, 54 L.Ed. 645 at 657 (1910); *Vermont v. New Hampshire*, 289 U.S. 593, 77 L.Ed. 1392 at 1403 (1933); *Arkansas v. Tennessee*, supra, at 1365 (1940).

4. Court actions concerning the lands in which a state assumed jurisdiction over the lands. See *Indiana v. Kentucky*, supra, at 335.

5. Acts and recognition of the individuals in the area that tend to support in which state the lands are located. See *Indiana v. Kentucky*, supra at 336; *Virginia v. Tennessee*, supra, at 544-546; *Louisiana v. Mississippi*, supra, at 933; *Maryland v. West Virginia*, supra, at 657-660; *Vermont v. New Hampshire*, supra, at 1405; *Arkansas v. Tennessee*, supra, at 1365.

6. Grants by the state to individuals. See *Indiana v. Kentucky*, supra, at 335; *Louisiana v. Mississippi*, supra, at 932.

7. The effect of a ruling upon the rights of private persons. *Virginia v. Tennessee*, supra, at 544; *Maryland v. West Virginia*, supra, at 659-660, and *Indiana v. Kentucky*, supra, at 336.

B.

THE ACQUIESCENCE OF THE STATE OF LOUISIANA

The other set of criteria adopted by the United States Supreme Court deals with a state's failure to assert any definite claim of right to the land in dispute or the failure of the state to claim jurisdiction over the lands. All of the cases cited above clearly make these criteria of utmost importance. Louisiana offered absolutely no proof to establish any claim to the property. The state of Louisiana and the Lake Providence Port Commission did not claim Stack Island until 1987, after the Plaintiffs filed their suit to quiet title. See Exhibits P-82, P-91, P-98, P-112 and Exhibits LA-37-A.3 and LA-37-A.1, and pages 4 through 6, supra.

The Plaintiffs and the State of Mississippi made sufficient proof on each of the criteria in order to prove the acts of dominion, control and sovereignty over Stack Island. Louisiana offered no proof of the United States land survey township plats, no proof of United States patents locating the property in Louisiana, no proof of the assessment and payment of taxes, no proof of its courts assuming jurisdiction over the lands, no proof of grants by the State of Louisiana to individuals, and no proof concerning the effect of the ruling upon the rights of private parties. By failing to offer any of this proof, the State of Louisiana has unquestionably failed to show that it has asserted any definite claim of right to the land in dispute and has failed to claim jurisdiction over the lands.

C.

THE PANEL MADE OBVIOUS ERRORS IN ITS FINDINGS CONCERNING TAXES

1. Contrary to the statement of the court at page 5134 of the decision that "there was some evidence that Mississippi assessed taxes against those individuals, although it is disputed whether the property taxes was Stack Island or the accreted lands," (also reference footnote 2 on page 5129), there is no dispute in the record that Stack Island was taxed by Mississippi since 1889. The first instance of the name "Stack Island" being attributed on a Corps of Engineers map to lands other than the lands in dispute is on a map dated in 1983, almost 100 years after the commencement of taxation of the island by Mississippi. See Exhibit LA-31-A. The Court obviously relied on misleading and erroneous information contained in the Louisiana Reply Brief at page 16 thereof.

2. Contrary to the statement of the Court at page 5135 of the decision that "there is some evidence that both states claimed the disputed lands as a tax base", there is no proof in the record that Louisiana claimed Stack Island as a tax base. The only proof offered by Louisiana concerning taxes was limited to the Louisiana mainland to the high bank. See pages 827 through 832 of the Transcript and Exhibit LA-37. There is no question that Mississippi is the only state that assessed taxes against Stack Island. The Court was clearly in error in making this statement. The Court obviously relied upon blatantly erroneous information in the Reply Brief of the State of Louisiana at page 16 thereof.

IV.

CONCLUSION

This Court was not justified in its decision that the district court committed clear error in its factual findings. To the contrary, the Judgments of the district court were based upon solid findings of fact and proper application of the law set out in *Missouri v. Kentucky*, supra, and under the Doctrine of Acquiescence. The Judgments of the district court should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert R. Bailess, attorney of record for the Plaintiffs/Appellees, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Gary L. Keyser, Esq.
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THIS 17th day of September, 1991.

/s/ Robert R. Bailess
 ROBERT R. BAILESS

IN THE
 UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

NO. 90-1031

JULIA DONELSON HOUSTON, ET AL

Plaintiff-Appellees

versus

RUTH M. THOMAS, ET AL

Defendants

ON APPEAL FROM THE
 UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
 WESTERN DIVISION, NO. 86-0080(B)

REPLY BRIEF OF STATE OF LOUISIANA AND
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INTRODUCTION

Plaintiff-Appellees (hereinafter "plaintiffs") detail four principal issues before the court in their statement of issues. Issues 1, 3 and 4, as stated by plaintiffs, will be taken up first in the argument below in that they all relate to Island No. 94, it's enlargement and migration to the south and west, it's eventual disappearance, migration of the river to the west and it's return back to the east, and the appearance of the "new Stack Island" in the same geographic location as original Island No. 94.

Issue No. 2, the question of whether Louisiana acquiesced in the exercise of jurisdiction, sovereignty and possession by Mississippi and by plaintiffs will be taken up as the second item of argument.

At the outset, the attention of the Court is drawn to the fact that while Appellee's brief plows over many of the exhibits offered, no where does it cite clear-cut testimony of any witness setting forth specific facts which would describe the avulsions plaintiffs claim had the effect of fixing a boundary along the Louisiana levee, instead of midstream along the downstream track of navigation where it belongs. The brief of plaintiffs is mere unsupported advocacy filled with technical facts which do not support the claim. There are no exhibits which show the river cutting through its banks and creating a new bed, leaving an old channel and bed between abandoned banks.

It should also be noted that while not so stated, plaintiff's are claiming that *two* avulsions occurred in the Mississippi River in the vicinity of Lake Providence, and they failed to prove at trial that either occurred. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established;

Following is a description of the two avulsions claimed by plaintiffs:

- (1) The enlargement of the east chute channel at Stack Island to the North between 1908 and 1913 is one claimed avulsion; and

- (2) The second avulsion is claimed to have occurred on the westerly shore below Lake Providence between the years 1913 and 1954, as set forth in paragraphs 56 through 58 of the Complaint To Remove Cloud.

Proof of both claimed avulsions is necessary to support the boundary claimed by plaintiffs. Louisiana has clearly refuted the claimed avulsions and shown the proposed boundary to be in error. It should also be noted that there is no logical way of connecting plaintiffs claimed avulsions which would have occurred on opposite sides of the river.

ARGUMENT ON PLAINTIFF'S ISSUES 1, 3 & 4

In the original brief of the State of Louisiana and Lake Providence Port Commission, it was pointed out that there are currently two areas in the vicinity of this dispute known as "Stack Island":

- (1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as the "the island" or "Stack Island", as it appears to be an island at extremely high water; and
- (2) The "new" island which had developed at the precise geographic location of original Island No. 94 is known as "Stack Island".
(Pages 5 & 6, original brief)

As to item (1) above, the District Court correctly found in it's bench opinion of June 23, 1989 that the land mass accreted to the Louisiana shore is "for large portions of the year completely dry between what is called the island and the high bank on the Louisiana side",

making it a part of the bank.¹ As can be seen from the map exhibit, Item 1, found in the Appendix at the end of this brief², there can be no doubt that there has been enormous accretion to the Louisiana Bank at Lake Providence and that draftsmen have sometimes referred to the new land as "Stack Island". This is also shown on the series of flood control and navigation maps of the Mississippi River Commission offered by Louisiana as LA-26, LA-27, LA-27A, LA-27B, LA-29 and LA-31. This accretion is clearly *not* the original Island No. 94.

As to Item (2) above, it is also beyond any doubt or question that there is a "new" island in the same geographic location as the original Island No. 94.² This is the "Stack Island" for which the plaintiff's have been paying taxes for many years, as shown by the various tax assessment and payment exhibits included in globo in P-64. A portion of P-64, the certificate of the Chancery Clerk of Issaquena County, Mississippi, included as Item 2 in the Appendix at the end of this brief along with two tax notices, shows that the taxes paid by plaintiffs are on the Stack Island located in Section 27, Township 11 North, Range 9 West, located adjacent to Mississippi on the east bank.

¹ Under Article 456 of the Louisiana Civil Code, the bank of a navigable river is the land lying between the ordinary low and ordinary high stage of water, and is owned by the private riparian, subject to public use.

² 1988 Flood Control and Navigation Map, Mississippi River Commission

Thus, Island No. 94 surveyed in 1881 was located geographically in Section 27, T11N, R9W of the Choctaw Land District, at least as located by the surveyor at that time; the "new Stack Island" is located in the same section, township and range, although larger and having a more northerly bearing²; and the accretion against the west bank of the river at Lake Providence is located in a different township, range and land district, being Township 21 North, Range 13 East of the *Red River Land District*. As argued in the original brief filed by Louisiana (page 15), even the plaintiff's expert, Austin Smith generally admitted by locating their features on plaintiff's maps (P-1 and P-2) that the "new Stack Island" and the accretion to the west bank are in *different* locations and *different* land districts. Item 1 in the Appendix to this brief, shows the precise location of the 1881 Island No. 94 overlaid on the "new" island in the same location, as do Louisiana's other exhibits listed above, which also include low water accretions to Island No. 94.

As pointed out at trial and in Louisiana's original brief, the avulsive displacement of the river from the east chute channel in 1882 by the dike works of the Mississippi River Commission had the effect of freezing the boundary *east* of Island No. 94, six (6) years prior to the issuance of the federal patent. Austin Smith claims that this occurred in 1884 because of a flood, as shown at pages 8 and 9 of this brief. Nonetheless, the avulsive abandonment of the east chute channel was complete some years before the patent erroneously located the island in Mississippi.

Consequently, the State of Louisiana and the Lake Providence Port Commission characterize plaintiffs case

as a classic land grab action filed against numerous Louisiana individuals and not against the State of Louisiana, the Lake Providence Port Commission or the Fifth Louisiana Levee Board, who were forced to intervene. As shown by the testimony and evidence, only the Louisiana riparians have paid property taxes to Louisiana on the property on the west bank and the accretions to their property on the west bank, and they have used the newly formed land as their own over a period of many years, since its earliest formation. See LA-37, offered by stipulation in lieu of LA-38 through LA-50; R.827-832; Appellant's original brief, pages 29-33. It is clear from the ownership information shown on the Tobin Map, LA-37, together with the stipulation, that the Mississippi plaintiffs never owned or paid taxes on the defendant's land or accretions on the Louisiana side of the river. From the testimony of the state and federal witnesses called by Louisiana, Mississippi people such as the plaintiffs had never even been *seen* on the Louisiana side, much less exercised jurisdiction over the Louisiana lands as claimed by plaintiff's few witnesses ("Horsefly" Higgins, "Jelly" Higgins, James Kelly).

Plaintiff's Legal Theory -

In the complaint filed by the plaintiffs in the U.S. District Court, styled a "Complaint To Remove Cloud", plaintiffs set forth the facts which they claim support their legal theory of ownership of the accretion attached to the west bank of the river at Lake Providence. This complaint is made a part of Louisiana's Motion to File Complaint with the U.S. Supreme Court, found as Item A

in the Appendix included in the original brief filed herein by Louisiana and the Lake Providence Port Commission.

Commencing at paragraph 55 of the Complaint to [sic] Remove Cloud, plaintiffs set forth the underlying facts which they rely upon, tailoring the facts and misstating them to fit within applicable legal principles which would be controlling where a true avulsion has taken place on a river such as the Mississippi.

Because plaintiffs have set forth the factual elements of their claim in paragraphs 55 through 58, they will be repeated verbatim here to show how an effort has been made to create an avulsion where none existed in order to make out a case for a frozen thalweg so that a favorable boundary can be drawn for plaintiffs *along the Louisiana levee*. Following are those factual allegations:

55. Plaintiffs alleged that the said Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward until it reached its present location. Further, from the time of its formation, the Island and its accretions have been bounded on the West by the Mississippi River channel thalweg-Interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed that lies entirely within Mississippi.

56. Plaintiffs also allege that after about 1908, the river gradually enlarged the bounding chute channel on the East. Further, in about the year

1913, the enlarging Mississippi chute channel was adopted for navigation.

57. Plaintiffs allege that after about the year 1925, the bounding Mississippi chute channel continued to enlarge the flows increased therein with corresponding lessening of flows in the Mississippi-Louisiana bounding channel on the West. Further, by about 1934, divided flow conditions were favorable for the formation of accretions to the foot of Stack Island and for the river to gradually and finally abandon the old Mississippi-Louisiana channel West of Stack Island. By the year 1954, this old abandoned channel had become attenuated and filled by alluvium (silt and sand). Likewise, by the year 1962, the old channel along Hagaman Revetment in Lake Providence Bend became attenuated and filled by aluvium.

58. Plaintiffs also allege that the enlargement of the former East chute channel of the Mississippi River and the corresponding abandonment of the West bounding channel was avulsive in nature and did not operate to change the ownership of the described lands but, by reason of the said avulsive action, the Mississippi-Louisiana state boundary became firmly and finally fixed along the locus of the middle of the former main navigation channel, sometimes called the thalweg, which former channel is identical with the West boundary of the lands described and known as Stack Island as described in Paragraph 48 above.

As will be shown below, some of the facts recited are correct, some are mis-stated and some are totally incorrect. Plaintiffs rely principally on the decision of the 8th

Circuit Court of Appeals in *Davis v. Anderson-Tully Company*, 252 F. 681 (8th Cir. 1918), found at pages 17 and 18 of their Appellate brief and attempt to tailor the facts of this case to fit the principles set forth in *Davis*.

The facts in that case were substantially different than the facts in the case now before the court, in that in *Davis*, there was a true avulsion and the main channel of navigation of the Mississippi River changed its course by the sudden and violent process of avulsion, abandoning its former bed around a bend and establishing a *new* channel in a *new* bed contained by *new* banks, although the former channel remained navigable for at least ten (10) years thereafter. (At 252 F. 684) The language of the case describes the river cutting a new course across land "not by creeping", but by "jumping over" and "making or adopting a new course". (At 252 F. 685)

In the present case, the Mississippi River in the vicinity of Lake Providence has never left it's banks; it has never formed a new channel in a new bed, and has never abandoned a former channel. The river flow divided around the original Island No. 94, and the main channel of navigation has shifted back and forth from the east to the west over the years, with both channels continuously in existence. That is, the downstream track of navigation has sometimes been in the east channel, sometimes the west channel, and moving back and forth over time. The river has always remained in its banks and never cut through them, forming a new channel.

As correctly stated by the plaintiffs in paragraph 55, the original Island No. 94 "was subject to the divided flows of the Mississippi River and to the natural erosion

and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward * * * ". This does not describe an avulsion.

The language of the complaint goes on to state that "until it reached its present location." This is incorrect, as the map exhibits show that while Island No. 94, the original Stack Island, did gradually, progressively and imperceptibly enlarge southward and westward, it was eventually washed away. Simultaneous with the enlargement of the island to the south and the west, the river scoured into the west bank at Lake Providence as the river itself moved westerly. Around 1930, the river began moving back to the east, depositing substantial alluvion from upstream against the west bank of the river at Lake Providence, filling in the eroded area.

It is this accreted land mass which plaintiffs would like to add to their ownership of lands in the vicinity, including the new Stack Island now in place in the same geographic vicinity as the original Island No. 94. Plaintiffs state at page 2 of their appellate brief, in part, that "there is and was no issue in the District Court concerning any islands presently located near the east bank of the Mississippi River". However, as pointed out above, the tax payment proof offered by plaintiffs relates to the new island near the east bank, not the accretion to the west bank. See Appendix Item 1.

As plaintiffs state at page 25 of their appellate brief, the Fifth Circuit has already given a favorable judgment on "the property in question", as against the riparian owner in Mississippi. Louisiana was not brought into that

case, either, nor were the issues the same. Consequently, if the lower court judgment in this case is upheld, plaintiff will have won the new Stack Island on the east bank, the accreted lands on the west bank, and a boundary along the Louisiana levee.

Plaintiffs correctly state in paragraph 56 of the original complaint "that after about 1908, the river gradually enlarged the bounding chute channel on the east." This is shown by LA-16 and LA-16A, which prove that by the year 1909, the downstream track of navigation was once again in the chute channel east of the original Stack Island, but the river continued to be divided around Stack Island and in no way cut through it's natural banks or abandoned its bed. The enlargement of the east chute channel simply led to navigation adopting this course as the downstream track of navigation, being the safer course due to unpredictable shoaling and sand bars which developed to the west of Stack Island.

Although the plaintiff's expert, Austin Smith, claims an avulsion occurred during what he calls a major flood of 1912-1913, he admitted that "the flow was pretty well divided at that particular time on the east side and on the west side" of Stack Island. (R. 334) There was likely an enlargement of the east channel at this time, but no avulsion could have occurred and there are no known facts to suggest or support such a dramatic change in the river. He further testified that "conditions were favorable for the island to go downstream", clearly meaning that the island is facing significant flow from the north and is going to migrate. Later, of course, it was totally washed away from its 1881 location and subsequently disappeared.

Austin Smith's strongest testimony in which he attempts to characterize river changes as avulsive in nature is found in the record at page 334 and 338. His testimony is less than convincing. At page 334, he states as follows:

A. No, sir. The major flood of 1912 and 1913 apparently enlarged the chute channel and this was adopted by navigation. That adoption is avulsive in nature and it leaves the Mississippi-Louisiana thalweg boundary on the west channel. (Emphasis ours)

To state that an "apparent" enlargement of the east chute channel is an avulsion is patently ridiculous, especially since Austin Smith had testified just a moment earlier that "the flow was pretty well divided at that particular time on the east side and on the west side." (R.334) Consequently, plaintiff's effort to support the claim made in paragraph 58 of the complaint, stated above, fails miserably, for the only person called by the plaintiffs to testify on this point is saying that an equally divided flow around the island, with an "apparent" enlargement of the east chute channel resulted in an avulsion. This makes no sense and is contrary to applicable principles of law, which call for the thalweg boundary to move with the downstream track of navigation in an ambulatory river such as the Mississippi. A thalweg boundary is not frozen except by statute, treaty or a true avulsion.

Later in his testimony, at page 338, Austin Smith testified that:

A. Well, I'm not a "jump over" witness. The thalweg boundary thalweg stayed on the west

side of Stack island. The floods in 1912 and 1913 enlarged the chute channel to the east of Stack Island. And it was of an avulsive nature, that enlargement was. And it was adopted by navigation. And the boundary thalweg remained on the west side of Stack Island under those conditions. This has happened in other places.

Q. Repeat that, Mr. Smith, please.

A. Such action of enlarging the chute channel, of an island is called avulsing, leaving the boundary channel on the other side of the island unaffected.

Again, quite ridiculously, Austin Smith is contending that the enlargement of the chute channel is an avulsion, without describing any other factual occurrence in support of this claim. The plaintiffs never identified the purported location of the avulsion; never described the river moving from its banks or cutting a new bed; never described any actual abandonment of a former river bed; but only the gradual enlargement of the chute channel, with the flow of the river roughly divided between the east chute channel and the west channel.

It should also be noted that in a further effort to follow the language of *Davis v. Anderson-Tully, Company*, page 7, supra, counsel for the plaintiffs asks Austin Smith on several occasions to describe the river "creeping over" or "jumping over" Stack Island. This language is borrowed from page 685 of the decision. (252 F. 681, at 685)

Austin Smith candidly admitted that he was not a "jump over" witness (R. 338), and was not willing to attempt to describe exact details of some river action that might be the basis for a true avulsion, since there was no

documentary support for such testimony. Moreover, his only evidence of anything to support a claim of a flood in this region of the river during 1912 or 1913 comes from P-18, a hydrographic map introduced by Austin Smith. It clearly shows that no avulsion took place: (1) no former channel was abandoned (2) no banks were cut (3) no new bed, channel or banks were created.

Even assuming a flood, it cannot be seriously contended that the gradual shift of the course of navigation from one channel around an island to another channel is the equivalent of or supports a claim that an avulsion occurred, where the channels are roughly equal and exist simultaneously. This might be so if a gradual change in the downstream course of navigation was the equal of an avulsion, but such is simply not an applicable principle of law.

If Austin Smith's contention were true, there would be frozen interstate boundary thalwegs at *every* island location in the river where the course of navigation moved from one side of an island to the other over time. This is simply not correct and can be determined by a review of U.S. Geological Survey Quadrangle Maps, for instance, showing the boundaries between states following the course of navigation, except where there has been avulsive cut-offs of bends of the river. The result is generally a "false river", being a former loop of the river sealed up at its ends. The dynamics of this type of occurrence are shown in the Appendix to this brief, Items 3 and 4.

Paragraph 57 of the complaint alleges that after about 1925, the bounding Mississippi chute channel continued to enlarge with a corresponding lessening of flows in the

bounding channel on the west. In fact, as will be seen from the various map exhibits, such as LA-18, LA-18, LA-19 and LA-21, and as stated on page 8 above, the river had scoured into the west bank at Lake Providence as it moved slowly westerly. Around 1930, the entire river began moving back to the east, still within its banks, depositing substantial alluvion against the west bank adjacent to Lake Providence and below.

Paragraph 57 of plaintiff's complaint is worded to suggest that there was an "old abandoned channel", but in fact, as the river moved it simply deposited alluvion in the location where water had run previously. There was never an abandonment of a channel with distinct banks, only the gradual movement of the river to the west, refilling the area with alluvion which it had scoured between 1915 and 1930. Here, the effort of the plaintiffs is to try and "create" an abandoned river bed where none existed. The alluvion deposited against the west bank at and below Lake Providence is evident from reviewing any map 1925 or later used in this case. For instance, the map exhibit, Item 1, found in the Appendix of this brief clearly shows the accretion left in the wake of the easterly migrating river. The accretion re-built the eroded sections of Louisiana land caused by the earlier migration of the river to the west.

What the plaintiffs are trying to suggest is that there is an "old abandoned channel" west of the accretion at Lake Providence. Again, plaintiffs used the language of relevant cases and tried to demonstrate that the changes which occurred in this reach of the river are avulsive in nature, but the so-called old abandoned channel is nothing more than the accreted and filled in westerly edge of

the former course of the river against the west bank. No channel of the river with distinct east and west banks was cut off, abandoned and filled by alluvion, it is simply the westerly edge of the former river course, the easterly edge of which is on the east bank of the river. The river at no time cut through its banks or the levees or abandoned an old bed of the river. No where in his testimony does Austin Smith describe any phenomenon like or approximating an avulsion or the abandonment of a former reach of the river.

As will be seen from the map in the Appendix at the end of this brief, as well as numerous other exhibits, such as LA-30, and LA-32D contained in the appendix filed in a separate volume with this reply brief, the river simply migrated gradually to the east, leaving accretion to the westerly bank. In questioning plaintiff's witness, Austin Smith, counsel for the plaintiffs always refers to "the abandoned channel west of Stack Island", as if such a abandoned channel actually existed. Austin Smith responds by testifying that the "flow has been closed off", all in an effort to suggest that there was in fact some cutoff loop of the river in the area near Lake Providence, but this clearly never occurred. (R.395-397) Again, counsel for plaintiff is attempting to utilize the language from *Davis v. Anderson-Tully Company*, page 7, supra, to suggest an avulsion and resulting abandonment of a course of the river. Parenthetically, this never occurred and Austin Smith was never able to describe a precise location for the claimed avulsion; a precise location where the banks of the river had been severed; a precise location where a new river bed had been scoured through land; or where new banks might have been created. At all times, the

river has been contained between its eastern bank and its western bank, although the banks have been scoured away and added to as a river undulated slowly back and forth over the last one hundred fifty (150) years pertinent to this case.

As to the location of Island No. 94 at the time of the patent in 1888, it should have properly been located in Louisiana, but because the original survey of 1881 failed to take account of the fact that the east chute channel was the downstream track of navigation at the time, the surveyor erroneously located the island in Mississippi. Later, the patent was issued based upon the 1881 survey, although the dike works of the Mississippi River Commission had, following the dike project in 1881 to 1882, closed off the east chute channel, throwing the downstream track of navigation west of the island. These facts were not understood at the time of patent, although as a practical matter the only difference this makes is that Mississippi has gained some ad valorem taxes attributable to the original location of Stack Island over the years. Intervenor's do not claim ownership of the island now located at the same geographic coordinates as the original island, and it continues to be taxed by Mississippi. The accretion to the west bank claimed by plaintiffs is entirely different land which formed commencing in the late 1920's, 1930's and later.

As shown in Appellant's original brief at pages 12-14, 17-23, the annual report of the Mississippi River Commission for the years 1881 and 1883, LA-18A, show the details of the Mississippi River Commission project to construct dikes and force the main channel of the river from its location in Stack Island Chute (east), along the

outside of the island to the west. About this, there can be no doubt, even though the trial judge chose to ignore these reports after questioning Louisiana's experts about their meaning, which is rather plain.

It should be noted that plaintiffs expert, Austin Smith, admitted having knowledge of the Mississippi River Commission dike construction project and that the selection of the west channel for the main flow of the river was the purpose of the project, although he refused to admit that the downstream course of navigation was in the east chute channel at the time it was closed off (R. 417-440). Austin Smith agrees that the east chute channel had been totally closed by 1894, although attempting to attribute it to floods rather than the Mississippi River Commission dike construction project. Nonetheless, the east chute channel was closed, whether by virtue of the dike project or the floods and, consequently, because of the sudden, immediate and avulsive nature of the closure, the boundary would have been frozen east of the island, thereby throwing the island into Louisiana territory, contrary to the surveyors map of 1881, which was made prior to the avulsion of 1882 (1884 as claimed by Smith). Later, in 1888, the patent was based on the 1881 survey, but without reference to the avulsion.

All of this supports Louisiana's position that at the time of patent, the island was actually within Louisiana territory and the patent erroneously showed it to be in Mississippi.

ARGUMENT ON PLAINTIFFS ISSUE 2

Louisiana's argument on the question of acquiescence and possession of "Stack Island" is contained in appellants original brief herein, pages 29-33.

It is interesting to note that while plaintiffs rely upon their Exhibit P-64 (Appendix Item 2), containing a certificate of the Chancery Clerk of Issaquena County regarding taxes, the taxes paid were not on the accretion to the west bank of the river at Lake Providence, which seems to be the object of this suit, but rather on the geographic location of the original Island No. 94, as shown on pages 3 and 4 of this reply brief. The documents from P-64, show the geographic location of the taxed land being in Section 27, T11N, R9W. Consequently, the plaintiffs have never paid taxes on the land which accreted to the Louisiana shore.

Plaintiffs also argue at page 12 of their appellate brief that Louisiana never offered any evidence regarding the assessment of taxes by Louisiana on "Stack Island". Actually, counsel for the plaintiffs stipulated to LA-37, a Tobin Map showing that the riparian lands on the west bank of the river are owned by Louisiana residents. It was stipulated that the Louisiana riparians paid property taxes on both the riparian property and the accretions to it, and that the Mississippi plaintiffs never owned or paid taxes on this land on the west bank nor, as some of the Louisiana witnesses testified, had Mississippi people ever been seen on the west bank of the river. (R. 827-832; *supra*, pages 3-4)

Louisiana and the Lake Providence Port Commission offered numerous witnesses on the question of acquiescence and possession, most of which is contained in volume 10 of the record, pages 869 through 942. These witnesses include long time residents and riparian property owners from the west bank, Elizabeth D. Reed and Mrs. Vail Deloney, whose property has been in the Deloney family since before the turn of the century; a U.S. Fish and Wildlife Service Employee, Joseph A. Oliveros; Louisiana Department of Wildlife and Fisheries agents, Michael Murray and Joe Chatman; and other local residents who have hunted on the accreted area for nearly fifty years without having seen any Mississippi people whatsoever (Billy Jack Murray).

It is clear from the testimony of all of these witnesses for Louisiana that they consider the accreted land on the west bank to belong to Louisiana riparians and to be located within the territory of Louisiana. For instance, U.S. Fish and Wildlife Service Agent Joe Oliveros testified that all game violation cases that he knew of in this, his area of jurisdiction, went to court in Louisiana. The same was true for the Louisiana Department of Wildlife and Fisheries agent, who regularly patrolled the "island", being the accreted area attached to the Louisiana bank, writing game violations and prosecuting them in Louisiana courts. It is equally clear that the property owners did not consider the accretions to be in Mississippi, as they were paying taxes on the land in Louisiana (LA-37 and stipulation).

It is submitted that the Trial Court should have found that neither the State of Louisiana, nor the Lake Providence Port Commission, nor Louisiana citizens knew of,

or acquiesced in, any purported dominion of Mississippi residents or the State of Mississippi over the disputed territory attached to the west bank of the river at Lake Providence. It should also be noted that Charles Shelton (R. 84-110), a witness for the plaintiffs, testified that some of the accretion was clearly believed to be in Louisiana; that East Carroll Parish Sheriff Sam House not only claimed the accretion as his own but placed a fence around it and did not let anyone trespass on the accretion to his land.

It is submitted that the accretions to the west bank were possessed by, use by and enjoyed by the Louisiana residents, who paid taxes on the accretion. There has never been acquiescence or adverse possession by Mississippi residents and, particularly, not those who testified for the plaintiffs. The rule of law which should be applied is as found in *State of Louisiana v. State of Mississippi*, 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197, at 201 (1931). The claims of the plaintiffs should be rejected.

PLAINTIFFS HAVE FAILED TO CARRY THE BURDEN OF PROOF

The plaintiffs in this case must carry the burden of proving that the claimed boundary along the Louisiana bank from above to below Lake Providence, Louisiana, is a true and correct boundary. In paragraph 52 of plaintiffs Complaint To Remove Cloud, plaintiffs describe an exact boundary by latitude and longitude, claiming that there was an abandonment of the west channel which was

avulsive in nature and had the effect of fixing the boundary in the location of a claimed former thalweg (paragraph 58).

As pointed out on page 7 above, plaintiffs rely principally on the holding in *Davis v. Anderson-Tully Company* for language which they assert fits the facts of this case. In *Davis*, there was a true avulsion where the Mississippi changed its course, abandoning a former bed around a bend and establishing a *new* channel in a *new* bed contained by *new* banks.

In the case now before the court, there were no such changes and the plaintiffs could not show any. The testimony of the plaintiff's expert, Austin Smith, detailed no specifics and only generally followed what was alleged in paragraphs 55 to 58 of the Complaint To Remove Cloud. He described in most general terms what he considered to be an avulsion of the river, consisting of an "apparent" enlargement to the east chute channel, which is clearly *not* an avulsion. See pages 9-11, *supra*.

As this court held in *Shapleigh v. United Farms Company*, 100 F.2d 287 (1938), one asserting the location of a boundary line assumes the burden of proving that fact and a judgment cannot rest upon a mere guess or conjecture as to how and why a boundary may be so located. See also *State of Oklahoma v. State of Texas*, 260 U.S. 606, 67 L.Ed. 428, 43 S. Ct. 221 (1923); *State of Kansas v. State of Missouri* 322 U.S. 213, 88 L.Ed. 1234, 64 S.Ct. 975 (1944).

It is clear from the plaintiffs own exhibits that they cannot make out a case for a frozen boundary because the Mississippi has never left or cut through its banks, carving a new channel. For instance, one of plaintiff's main

exhibits is P-18, a 1913-15 Mississippi River Commission map which clearly shows that levees have been in place on both the east and west banks of the river at all pertinent periods of time. There are levee set backs shown, which show that the river has periodically scoured into each bank, but *never breached its banks*. The flow of the river is simply divided around island formations in the river, such as Stack Island, and no portion of the river channel anywhere in the vicinity of this dispute has been cut off or abandoned.

What has occurred is that the downstream track of navigation has shifted gradually from one side of island formations in the river to the other, allowing downstream navigation to follow the safer, shorter or swiftest course from time to time. Plaintiffs can make out no case for an avulsion, especially not by claiming a gradual abandonment of the channel between 1913 and 1954, as particularized in paragraphs 56, 57 and 58 of the Complaint To Remove Cloud. Clearly, no channel of the river was ever abandoned.

The accretion to the west bank of the Mississippi River at and below Lake Providence is very similar to the accretions which attached to the Louisiana shore at Albermarle Bend in *State of Louisiana v. State of Mississippi* 282 U.S. 458, 75 L.Ed. 459, 51 S.Ct. 197 (1931), wherein as the Mississippi River moved easterly, it ate away all of Tullos Island and large portions of the Mississippi shore. According to applicable rules of law, the interstate boundary line moved with the river as it gradually and imperceptibly moved easterly and northwardly some five or six miles. The accretions forming on the west bank became the territory of Louisiana, even though in

1912-1913, the river suddenly changed its course and cut across the bar formed by the accretions on the Louisiana side. By this avulsion, the river formed a new channel to the west, severing from the Louisiana shore a large portion of the accretion which had formed as the river moved easterly. Because the change was by avulsion, the boundary line remained fixed at the extreme easterly channel of the river as it was in 1912-1913.

In the case now before the court, as in the case cited, the evidence clearly shows that the accretion to the Louisiana shore was extended gradually and imperceptibly as the river moved easterly from around 1930 on, although no avulsion ever took place severing the accreted lands from Louisiana.

Also included for illustrative purposes in the Appendix at the end of this brief, are two exhibits showing typical avulsive cut offs in the Mississippi. The first, Item 3, shows the cut off loop which became False River at New Roads, Louisiana. The avulsive action of the river is obvious, showing False River Lake to be a classic cut off loop where the river cut through its banks, establishing a new bed and new banks, abandoning the old channel, bed and banks.

The fourth illustrative exhibit, Item 4, comes from *State of Louisiana v. State of Mississippi*, 283 U.S. 791, 75 L.Ed. 1417, 51 S.Ct. 369 (1931), showing another classic cut off loop in the river at Willow Point in the vicinity of the boundary between East Carroll Parish, Louisiana and Issaquena County, Mississippi. As held by the U.S. Supreme Court, the avulsive cut off led to a freezing of the boundary in the former thalweg of the cut off loop, as

shown on the map. No such cut off occurred in the case now before the court; hence, no avulsion could have occurred.

It is submitted that plaintiffs, conversant with these cases and knowing that there had been avulsive acts in the period 1912-13 in both earlier cases heard by the U.S. Supreme Court, selected that date in the instant case for the year that it is claimed the east chute channel enlarged. As noted above at page 2, there are in effect two claimed avulsions:

- (1) The enlargement of the east chute channel at Stack Island to the North between 1908 and 1913 is one claimed avulsion; and
- (2) The second avulsion is claimed to have occurred on the westerly shore below Lake Providence between the years 1913 and 1954, as set forth in paragraphs 56 through 58 of the Complaint To Remove Cloud. (See page 39 of appellant's original brief)

As shown in Appellant's original brief (pages 24, 25, 34, 39, 41) plaintiffs expert, Austin Smith, chose not to use the Lake Providence Quadrangles of 1909 and 1911, introduced by Louisiana as LA-16A and LA-16, even though the exhibits were exchanged long prior to trial, as admitted by Austin Smith on a cross examination. (R. 414-418, at 415) These two exhibits clearly show that the east chute channel was already the downstream track of navigation as early as 1909, so the flood claimed to have "apparently" enlarged the east chute channel in 1912-13 came long after the thalweg had shifted. There is no evidence of any avulsive act around this time, and the downstream

track of navigation had simply shifted to the east of the island by 1908-1909.

PLAINTIFFS EXPERT, AUSTIN SMITH, WAS NOT CREDIBLE AND HIS TESTIMONY SHOULD BE REJECTED

Austin Smith did not use certain key exhibits in his testimony which he was aware of prior to trial and cross-examined about during trial. One of these is the Mississippi River Commission Report and map introduced as LA-18A documenting the location of the main navigation channel of the river on 11 August, 1881 as lying in Stack Island Chute east of the Island. This clearly places Island No. 94, sometimes known as Stack Island, in Louisiana territory, although the U.S. Deputy Surveyor was not aware of this information and erroneously placed the island within the territory of Mississippi. As discussed in Appellant's original brief, pages 17-20, the Mississippi River Commission construction works forced the downward track of navigation out of the east Stack Island Chute and into the west channel around 1882, the year after the survey of Island No. 94 by the U.S. Deputy Surveyor, and six years prior to the issuance of the patent on the island. This avulsive change which had the effect of forcibly evicting the navigation channel from the Stack Island Chute, had the effect of freezing the boundary east of the island, six years prior to its being patented out of the government of the United States. Austin Smith admitted having knowledge of the Mississippi River Commission dike construction project; of the exhibits offered by Louisiana; and admitted that the east chute channel had

been totally closed by 1894, four years prior to the issuance of the patent. See page 15, *supra*. Nonetheless, he inexplicably continued to insist that the track of navigation was not in the east chute channel, from which it was forcibly evicted according to the express language of the reports.

Austin Smith also failed to use the Lake Providence Quadrangles of the U.S. Geological Survey dated 1909 and 1911, introduced by Louisiana as LA-16 and LA-16A, although he was aware of these exhibits and they were exchanged long prior to trial, which he admitted on cross-examination. (See page 21, *supra*).

It is generally held that where a party fails to produce available evidence, a presumption or inference arises that such evidence or testimony would have been unfavorable to him, raising the further presumption or inference that the cause of action is without substantial foundation, especially where the evidence is significant to the issues. See 29 Am. Jur. 2d 175, at 220 et seq. The logical inference from plaintiffs failing to utilize LA-16, LA-16A and LA-18A is that the documents would not support the plaintiffs assertions and would have been unfavorable to their position. See *Kirby v. Tallmadge*, 160 U.S. 379, at 382, 40 L.Ed. 463, 16 S.Ct. 349 (1896); *Runkle v. Burnham*, 153 U.S. 216, 38 L.Ed. 694, 14 S.Ct. 837 (1894); Additional citations at 29 Am. Jur. 2d 178, page 222.

As further argued at page 11 of Appellant's original brief, Austin Smith is not a credible witness and his testimony has previously been rejected by the U.S. Supreme Court in another boundary case between the two states, *State of Louisiana v. State of Mississippi*, 466 U.S.

96, at 104, 80 L.Ed. 2d 74, 104 S.Ct. 1645 (1984). In that case, the Special Master found "no evidence in the record" to support Austin Smith's placement of the boundary. The U.S. Supreme Court recited the Master's findings rejecting Mr. Smith's purported line and upheld these findings in every respect, at pages 105 and 106.

In this case, as in the previous case, no weight should be attached to Mr. Smith's opinion, especially since he cannot support it with documentary evidence and because it flies in the face of evidence submitted by Louisiana.

While it is the Federal Rule that due regard should be given to the trial court to judge the credibility of witnesses, where testimony is not credible and not based upon facts and documents placed in evidence, the "clearly erroneous" rule should apply and the judgments of the trial court should be set aside. See *Graver Tank v. Linde Air Products Company*, 69 S.Ct. 535, 93 L.Ed. 672, 336 U.S. 271 (1949).

CONCLUSION

It is submitted that there is no evidence to support Austin Smith's contentions and interpretations, and the trial court finding is erroneous. It is the established jurisprudence under Rule 52(a) of the Federal Rules of Civil Procedure that a finding is "clearly erroneous", as here, when the reviewing court on the entire record and evidence before it is left with a definite and firm conviction that error has been committed. See *United States v. United States Gypsum Company*, 333 U.S. 364 at 395, 92 L.Ed. 746, 68 S.Ct. 525 at 542 (1948); *W.S. Shamban & Company v.*

Commerce and Industry Insurance Company, 475 F.2d 34 (1973). The trial court ruling should be reversed. (See also, page 35 of Appellant's original brief.)

Respectfully submitted,
WILLIAM J. GUSTE, JR.
Attorney General

By: /s/ Gary L. Keyser
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CERTIFICATE

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record, postage prepaid, this 10th day of October, 1990.

/s/ Gary L. Keyser
GARY L. KEYSER

APPENDIX

- | | |
|-------------|--|
| <u>Item</u> | |
| 1. | 1988 Flood Control and Navigation Map, Mississippi River Commission |
| 2. | P-64 (portion) - Certificate of Chancery Clerk, Issaquena County, Mississippi, and tax notices (2) |

3. The neck cutoff oxbow Lake Cycle along the lower Mississippi River, Sherwood M. Gagliano and Perry C. Howard, October 24-26, 1983. Figure 3 shows geomorphic elements of False River, Louisiana
 4. Map of the boundary line between Louisiana and Mississippi in *State of Louisiana v. State of Mississippi*, No. 6 Original, Supreme Court of the United States, 283 U.S. 791, 75 L.Ed. 1417, 51 S.Ct. 369 (1931)
-

MAR 3 1992

THE CLERK

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

v.

Petitioners,

THE STATE OF LOUISIANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION
BY THE STATE OF LOUISIANA AND THE
LAKE PROVIDENCE PORT COMMISSION

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March 3, 1992

No. 91-1158

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,
v. *Petitioners,*

THE STATE OF LOUISIANA, ET AL.,
Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**PETITIONERS' REPLY TO BRIEF IN OPPOSITION
BY THE STATE OF LOUISIANA AND THE
LAKE PROVIDENCE PORT COMMISSION**

It would be a most unusual physical phenomenon if, as Louisiana suggests, Stack Island materialized in 1881, the effective date it was patented as Mississippi land. No "new theory" was advanced to the court below or to this Court. The claim has been the same since the outset. *See, e.g.,* the description of Plaintiffs' trial exhibits Nos. 1-5, Appendix to Louisiana Brief in Opposition at pages 18a and 19a.

CONCLUSION

Certiorari should issue to correct the decision of the court below and establish the correct boundary between the states of Mississippi and Louisiana.

Respectfully submitted,

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March 3, 1992

MAY 19 1992

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Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1-126

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Petition For Certiorari Filed On January 16, 1992
Certiorari Granted March 23, 1992

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MISSISSIPPI DISTRICT COURT

DATE	NR.	PROCEEDINGS
7-29-86		Complaint, orig. & 47 copies, filed.
6-17-87		State of Louisiana's Motion for Intervention, also Lake Providence Port Commission filed.
7-1-87		ORDER: that Motion of State of Louisiana and Lake Providence Port Commission for leave to intervene in these proceedings is GRANTED, filed (JRC), copies mailed dkt'd 7-6-87.
7-30-87		INTERVENTION of the State of Louisiana and the Lake Providence Port Commission, filed.
11-24-87		Intervenor's Motion for Order to File Third Party Complaint, w/c/s, filed.
11-24-87		ORDER: that Intervenor is allowed to file Third Party Complaint, filed (JRC), copies mailed.
11-24-87		THIRD PARTY COMPLAINT, filed.
1-11-88		State of Miss' ANSWER to THIRD PARTY COMPLAINT, w/c/s, filed.

4-25-89 State of Louisiana's mtn for separate trial of interstate boundary issue w/ntc of mtn bfr Judge Barbour in Vicksburg.

5-5-89 ORDER: various mtns to strike answe and counterclaims of defts taken under advisement as set out; the case is separated into 2 trials; mtns for substitution of parties is granted & Martha Cecillia Russell Reed & Lynn Ogden Russell are substituted for Kathleen P. Russell and Ogden "Sonny" Russell, also Sam Donald, is substituted for Bessie Price Talbert Purdy - said parties to show cause w/in 12 days from 5-5-89 why default should not be entered. WHB, cc. eod 5-10-89.

5-17-89 Statement of position of the State of Louisiana & Lake Providence Port Comm.

6-5-89 State of Louisiana & Lake Providence Port Comm's Suppl Statement of Position.

7-3-89 JUDGMENT: that Stack Island, or land no.94 is located wholly within the State of Miss; further, the 2nd trial to determine all other

issues is set for 10-2-89 in Vicksburg, OB 1989 pg. 168-174. WHB, cc.

9-25-89 Intervenor, State of Louisiana & the Lake Providence Port Comm's mtn to accept testimony & exhibits offered in 1st phase of the trial w/attachs and ntc of mtn bfr Judge Barbour ASAP.

9-25-89 ORDER: that all testimony & exhibits produced by Intervenor at the 1st phase of the trial is accepted for all purposes in the 2nd phase. WHB, cc.

12-13-89 JUDGMENT: that the property which is the subject of this litigation is located in Mississippi and that the pltfs are the owners as set out; further, this judgment, along w/a copy of the plat of Exh. P-32D which is attached may be recorded in the Land Records of Issaquena County, MS and in the Clerk's office in East Carrol Parish, Louisiana, OB 1989, pg. 429-437. WHB, cc. (Copies also mailed to defaulted defts per Mr. Bailess)

1-8-90

State of Louisiana and the
Lake Providence Port
commission's **NOTICE OF
APPEAL** to the U.S. Court of
Appeals for the 5th Cir from
judgment dated 7-3-89 and
judgment filed 12-13-89.

[5TH CIRCUIT]

OCT 22 1991 Order Denying Rehearing

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

MOTION FOR INTERVENTION OF STATE OF LOUISI-
ANA AND LAKE PROVIDENCE PORT COMMISSION
(Filed June 17, 1987)

NOW INTO COURT comes the State of Louisiana and the Lake Providence Port Commission, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana, and other undersigned counsel, who move for leave of court to intervene in this action as a matter of right under the Constitution of the United States; acts of the United States Congress; and under 28 USC 1331, 2201 and 2202, as well as other causes of action not asserted by the original plaintiffs or defendants, as set forth in the proposed complaint; and that this court should exercise jurisdiction over the claims of intervenors accordingly.

Respectfully submitted,

STATE OF LOUISIANA

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
Attorney General

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

MEMORANDUM IN SUPPORT OF MOTION FOR
INTERVENTION OF STATE OF LOUISIANA AND LAKE
PROVIDENCE PORT COMMISSION

The original complaint filed herein is styled as a Complaint To Remove Cloud and identifies numerous plaintiffs as the owners in fee simple of a certain tract of land purportedly lying in Mississippi, described with particularity in paragraph 52 thereof.

Complainants recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi, as set forth in paragraph 54 of the Complaint.

Thereafter, in paragraph 55 and following paragraphs, complainants allege that Stack Island was affected by the divided flows of the Mississippi River into the natural erosion and accretion processes of the river, gradually migrating southward and westward.

Intervenors now show that their rights arise under the Constitution of the United States and an act of Congress approved April 6, 1812, admitting the State of Louisiana into the Union of the United States of America,

which act is found in Chapter 50 of the United States Statutes at Large, Volume 2, Page 701; that the real question in dispute between the plaintiffs and the defendants is the location of the boundary line between the State of Louisiana and the State of Mississippi for the pertinent periods set forth in plaintiffs' complaint; that the determination of such boundary involves an interpretation of such acts of Congress setting forth the boundaries and determination of the boundaries between said two states; that this controversy further involves the equal footing doctrine applicable to the states of the United States; it would further appear to your petitioners, and it is so alleged, that the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, is also involved in this controversy, including an interpretation thereof as it affects or may affect such boundary between the State of Mississippi and the State of Louisiana, which can only be made pursuant to the Constitution of the United States and federal law involving a question of interpretation and application of federal law and jurisdiction. The above described action is a civil action in which this court has original jurisdiction in respect to the federal questions involved under the provisions of 28 USC 1331, 2201 and 2202.

This controversy also involves a dispute between citizens of different states having separate and independent claims as between citizens of different states in that plaintiffs are citizens of the State of Mississippi; adult non-residents of the State of Mississippi, domiciled in Louisiana; the Federal Deposit Insurance Company; unknown heirs at law; as against defendants alleged to be

the owners of land in Louisiana who have made assertions of ownership to portions of the lands of plaintiffs, as set forth in paragraph 60 of the Complaint, whereby said acts on the part of defendants are alleged to have created a cloud upon the title of plaintiffs, which plaintiffs are allegedly entitled to have removed.

It is now shown that a large and substantial portion of the lands in question are owned by the State of Louisiana and/or the Lake Providence Port Commission, and said intervenors are entitled to a declaration of their rights and other legal relations as against plaintiffs, pursuant to 28 USC 2201, et seq, and other applicable law, as cited hereinabove and as may be found by the court to be applicable to this cause.

Accordingly, the State of Louisiana and the Lake Providence Port Commission moves this Honorable Court for leave to file its Petition for Intervention based upon its rights enumerated [sic] herein under the Constitution of the United States; acts of Congress; the cited statutes of the United States and Rule 24 of the Federal Rules of Civil Procedure.

Respectfully submitted,
STATE OF LOUISIANA

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
Attorney General

/s/ Gary L. Keyser
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

ORDER
(Filed July 1, 1987)

The foregoing Motion for Intervention considered:

IT IS ORDERED that the motion of the State of Louisiana and the Lake Providence Port Commission, ex rel. William J. Guste, Jr., Attorney General, of the State of Louisiana for leave to intervene in these proceedings is hereby granted.

Rendered and signed this 30 day of June, 1987 at
Jackson, Mississippi.

/s/ John R. Countiss
JOHN R. COUNTISS, MAGISTRATE
United States District Court
SOUTHERN DISTRICT OF
MISSISSIPPI

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

INTERVENTION
(Filed July 30, 1987)

NOW INTO COURT, comes the State of Louisiana and the Lake Providence Port Commission, appearing herein through the Honorable William J. Guste, Jr., Attorney General and Gary L. Keyser, Assistant Attorney General, and files this Intervention, alleging the following:

NATURE OF ACTION

This is a civil action brought by plaintiffs under 28 USC 1332, alleging that plaintiffs are the owners in fee simple of a certain tract of land lying in Issaquena County, Mississippi, described with greater particularity in paragraph 52 of the Complaint to Remove Cloud. Plaintiffs allegedly derived their title to the said lands according to a chain of title described in paragraphs 54 et seq. of the original Complaint.

JURISDICTION AND VENUE

1. This court has jurisdiction over the subject matter of this action pursuant to 28 USC 1331, 1332, 2201 and 2202; as well as under the Constitution of the United States and an Act of Congress approved April 6, 1812, admitting the State of Louisiana into the Union of the United States of America, which act is found in Chapter 50 of the United States Statutes At Large, Volume 2, page 701; and, further, under the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80.

2. Venue is proper before this district court pursuant to 42 USC 1391(f)(1), inasmuch as a substantial part of the property that is the subject of the action is or may be situated within this judicial district.

DEFENDANTS

3. Defendants, as alleged by plaintiffs, are adult non-residents of the State of Mississippi, domiciled in Louisiana; the Federal Deposit Insurance Company; unknown heirs at law; and residents and domiciliaries of the State of Louisiana.

4. Intervenors are the State of Louisiana and the Lake Providence Port Commission, an agency or instrumentality of the State of Louisiana under 28 USC 1603.

REFERENCE STATEMENT

5. The original complaint filed herein on behalf of numerous plaintiffs claiming to be the owners in fee simple title of a certain tract of land purportedly lying in

Mississippi, described with particularity in paragraph 52 thereof, is styled as a Complaint to Remove Cloud. The plaintiffs are citizens of the State of Mississippi; adult non-residents of the State of Mississippi; domiciled in Louisiana; the Federal Deposit Insurance Company; and unknown heirs at law. The defendants are numerous and are named in paragraphs 4-51, inclusive, it being alleged that none of them are residents of the State of Mississippi. However, it is noted that the Federal Deposit Insurance Corporation is named as both a plaintiff in the introductory statement and as a defendant in paragraph 47.

6. Plaintiffs recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi, as set forth in paragraph 54 of the complaint.

7. In paragraph 55 and following paragraphs, plaintiffs allege that Stack Island was affected by the divided flows of the Mississippi River into the natural erosion and accretion processes of the river, gradually migrating southward and westward. Natural processes have caused Stack Island to now be attached to the west bank of the Mississippi River.

8. The real question in dispute between the plaintiffs, defendants and intervenors is the location of the boundary line between the State of Louisiana and the State of Mississippi for all periods of time pertinent to the issues set forth in plaintiffs' complaint. The determination of the boundary involves an interpretation of the acts of Congress setting forth the boundaries and the determination of the boundaries between the two states. This controversy further involves the Equal Footing Doctrine

of the states of the United States; and it further appears to your intervenors, and it is so alleged, that the Treaty of Peace concluded between the United States and Great Britain on September 3, 1783, 8 Stat. 80, is also involved in this controversy, and including an interpretation thereof as it affects or may affect such boundary between the State of Mississippi and the State of Louisiana, which determination can only be made pursuant to the Constitution of the United States and federal law involving a question of the interpretation and application of federal law and jurisdiction.

9. This controversy involves a dispute between citizens in different states having separate and independent claims, as well as a dispute between citizens of one state and the sovereign itself of another state, i.e., the State of Louisiana, and the Lake Providence Port Commission, an agency and instrumentality of the State of Louisiana.

10. Plaintiffs' complaint appears to state a separate and independent claim as to each of the named defendants, with the possible exception of the Federal Deposit Insurance Corporation.

11. The amount in controversy as to each of the said defendants exceeds the sum of \$10,000.00, exclusive of interest and costs, with respect to each such separate and independent claim as to each said defendant, including the State of Louisiana and the Lake Providence Port Commission, intervenors.

12. Intervenors show that a large and substantial portion of the lands in question are owned by the State of Louisiana and/or the Lake Providence Port Commission, and said intervenors are entitled to a declaration of their

rights and other legal relations as against plaintiffs, pursuant to 28 USC 2201, et seq., and other applicable law, as cited hereinabove and as may be found by the Court to be applicable to this cause.

WHEREFORE, intervenors, the State of Louisiana and Lake Providence Port Commission, respectfully pray:

(1) That upon a final hearing hereof, judgment be entered determining the proper boundary line between the State of Louisiana and the State of Mississippi for all time periods pertinent to the issues set forth herein, according to the acts of Congress setting forth the boundaries and determination of boundaries between said two states, including application of the Equal Footing Doctrine; the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80 and an act of Congress approved April 6, 1812, admitting the State of Louisiana into the Union of the United States of America, United States Statutes at Large, Chapter 50, Volume 2, page 701, and other applicable law involving the question of boundary determination;

(2) That upon a final hearing hereof, judgment be entered in this cause adjudicating the lands in question to the proper parties as owners thereof, as between plaintiffs, defendants and intervenors, and further declaring the rights and other legal relations as between the parties;

(3) For such other relief as this Court may deem appropriate.

Respectfully submitted,
STATE OF LOUISIANA

/s/ William J. Guste
WILLIAM J. GUSTE, JR.
Attorney General

/s/ Gary L. Keyser
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Defendants, through counsel of record:

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL.

V.

CIVIL ACTION

RUTH M. THOMAS, ET AL., NO. W 86-0080(B)

RESPONSE TO INTERVENTION

COMES NOW Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston a/k/a George T. Houston, III, Deceased; and Ruth Houston Baker, individually, and in response to the intervention filed by the State of Louisiana and the Lake Providence Port Commission would respond, paragraph by paragraph, as follows, to-wit:

1. Plaintiffs admit this Court has jurisdiction over the subject matter of this action under 28 USC §1332. Plaintiffs deny the remaining allegations of Paragraph 1.
2. The allegations of Paragraph 2 are admitted.
3. The allegations of Paragraph 3 are admitted.
4. The allegations of Paragraph 4 are admitted.
5. Plaintiffs admit that they are the owners in fee simple title of a certain tract of land lying in Mississippi described with particularity in Paragraph 52 of the Complaint to Remove Cloud. Plaintiffs further admit that Julia Donelson Houston is an adult resident citizen of Mississippi and that Ruth Houston Jarvis Baker and Hines H. Baker, Jr. are adult resident citizens of Harris County,

Texas. Plaintiffs deny that any of them are domiciled in Louisiana, deny that the Federal Deposit Insurance Company is a plaintiff and further deny that any unknown heirs at law are plaintiffs. Plaintiffs deny the remaining allegations of Paragraph 5.

6. The allegations of Paragraph 6 are admitted.

7. Plaintiffs admit that in Paragraph 55 and following paragraphs of the Complaint to Remove Cloud, Plaintiffs set forth certain facts contained therein concerning the subject property. Said Complaint speaking for itself and requires no admission or denial herein. Plaintiffs deny the remaining allegations of Paragraph 7.

8. Plaintiffs admit that one question in dispute between Plaintiffs, Defendants and Intervenor is the location of the boundary line between the State of Louisiana and the State of Mississippi. Plaintiffs deny the remaining allegations of Paragraph 8.

9. Plaintiffs admit that this controversy involves a dispute between citizens in different states having separate and independent claims. Plaintiffs deny the remaining allegations of Paragraph 9.

10. Plaintiffs admit that their complaint states a separate and independent claim as to each of the named defendants. Plaintiffs deny the remaining allegations of Paragraph 10.

11. Plaintiffs admit that the amount in controversy as to each of the said Defendants exceeds the sum of \$10,000.00 exclusive of interest and costs with respect to each such separate and independent claim as to each said

defendant. Plaintiffs deny the remaining allegations of Paragraph 11.

12. The allegations of Paragraph 12 are denied.

Plaintiffs admit that this Court should be allowed to determine the proper boundary line between the State of Louisiana and the State of Mississippi for all time periods pertinent to the issues set forth in the Complaint to Remove Cloud and that upon a final hearing hereof judgment will be entered in this cause adjudicating the lands in question to the proper parties as owners thereof as between Plaintiffs, Defendants and Intervenor, and further declaring the rights and other legal relations as between the parties.

Respectfully submitted,

JULIA DONELSON HOUSTON,
RUTH HOUSTON BAKER AND
HINES H. BAKER JR., CO-
EXECUTORS AND CO-TRUSTEES
OF THE ESTATE OF GEORGE T.
HOUSTON, a/k/a GEORGE T.
HOUSTON, III, DECEASED; and
RUTH HOUSTON BAKER,
INDIVIDUALLY

BY: /s/ Robert R. Bailless
Robert R. Bailless
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

MOTION FOR ORDER TO FILE THIRD-PARTY COM-
PLAINT

INTERVENORS, the State of Louisiana and the Lake Providence Port Commission, appearing herein as third-party plaintiffs through the Honorable William J. Guste, Jr., Attorney General and Gary L. Keyser, Assistant Attorney General, respectfully move this Honorable Court for an Order permitting the filing of a Third-Party Complaint in this matter, naming the State of Mississippi as a third-party defendant, on the following grounds:

(1) That since the filing of the Intervention herein, plaintiffs, through counsel, have filed a response to the Intervention and admit in paragraphs 8, 9 and 12 thereof that one question in dispute between plaintiffs, defendants and intervenors is the location of the boundary line between the State of Louisiana and the State of Mississippi; that there is a controversy involving a dispute between citizens in different states having separate and independent claims; and that a final determination will involve not only the location of a proper boundary line

between the State of Louisiana and the State of Mississippi for all times pertinent to the issues herein, but also a judgment adjudicating the lands in question to the proper parties as owners thereof as between plaintiffs, defendants and intervenors, and further declaring the rights and other legal relations as between the parties;

(2) It is necessary for the State of Mississippi to be made a party herein in order to assure that all interests are properly represented in the litigation and that a proper boundary line between the State of Louisiana and the State of Mississippi be drawn with the full participation of the State of Mississippi, in addition to the determination of other rights and legal relations as between the states; and

(3) Rule 14 of the Federal Rules of Civil Procedure permit the filing of the Third-Party Complaint at this time.

Respectfully submitted,
WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Gary L Keyser
GARY L. KEYSER
Assistant Attorney General
Louisiana Department of Justice
Lands and Natural Resources
Division
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808
(504) 765-2416

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

ORDER

(Filed Nov. 24, 1987)

IT IS ORDERED that the foregoing Motion for Order to File Third Party Complaint by the State of Louisiana and the Lake Providence Port Commission is hereby GRANTED.

Jackson, Mississippi, this 23 day of November, 1987.

/s/ John R Countiss
JOHN R. COUNTISS, Magistrate
United States District Court
Southern District of Mississippi

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DISTRICT

JULIA DONELSON HOUSTON, ET AL.
Plaintiffs

VERSUS

RUTH M. THOMAS, ET AL.,
Defendants

CIVIL ACTION
NO. W 86-0080(B)

THIRD-PARTY COMPLAINT

(Filed Nov. 24, 1987)

NOW INTO COURT, comes the State of Louisiana and the Lake Providence Port Commission, Intervenor, appearing herein through the Honorable William J. Guste, Jr., Attorney General and Gary L. Keyser, Assistant Attorney General, and file this Third-Party Complaint, naming the State of Mississippi as third-party defendant, as follows:

1.

The original complaint filed herein on behalf of numerous plaintiffs claiming to be the owners in fee simple title of a certain tract of land purportedly lying in Mississippi, described with particularity in paragraph 52 thereof, is styled as a Complaint To Remove Cloud.

2.

The plaintiffs claim to be citizens of the State of Mississippi; adult non-residents of the State of

Mississippi, domiciled in Louisiana; the Federal Deposit Insurance Company; and unknown heirs at law.

3.

The defendants are numerous named individuals residing in the State of Louisiana, as set forth in paragraphs 4-51, inclusive of the complaint.

4.

Plaintiffs recite their title as having derived from patents of the United States of America and subsequently recorded in Mississippi, as set forth in paragraph 54 of the complaint.

5.

On information and belief, defendants' title is derived from patents of the United States of America and from the State of Louisiana pursuant to its inherent sovereignty; under the Equal Footing Doctrine; and according to the Treaty of Peace concluded between the United States and Great Britain on September 3, 1783, 8 Stat. 80 and an act of Congress approved April 6, 1812, admitting the State of Louisiana into the Union of the United States of America, United States Statutes at Large, Chapter 50, Volume 2, page 701, and other applicable law involving the determination of boundaries. Accordingly, an interpretation of the said doctrines and treaty as they affect or may affect the boundary between the State of Mississippi and the State of Louisiana must be made pursuant to the

Constitution of the United States and federal law involving the question of the interpretation and application of federal law and jurisdiction.

6.

This controversy involves a dispute between citizens in different states having separate and independent claims; a dispute between citizens of one state and the sovereign it self [sic] of another state, i.e., the State of Louisiana and the Lake Providence Port Commission, an agency and instrumentality of the State of Louisiana; as well as a dispute between two sovereigns, the State of Louisiana and the State of Mississippi, concerning the location of the boundary line between the two states.

7.

A final determination of this controversy will involve not only the location of a proper boundary line between the State of Louisiana and the State of Mississippi for all times pertinent to the issues herein, but also a judgment adjudicating the lands in question to the proper parties as owners thereof as between plaintiffs, defendants, intervenors and third-party defendant, the State of Mississippi.

8.

Third-party plaintiffs show that a large and substantial portion of the lands in question are owned by the State of Louisiana and/or the Lake Providence Port Commission; a large and substantial portion of the lands in

question are owned by residents of the State of Louisiana; and, accordingly, said parties are entitled to a declaration of their rights and other legal relations as against plaintiffs and third-party defendant, the State of Mississippi, as set forth hereinabove and as may be found by the Court to be applicable to this cause.

9.

Third-party plaintiffs show that a final determination will also involve the location of a proper boundary line between the State of Louisiana and the State of Mississippi for all times pertinent to the issues herein and, also, a judgment adjudicating the lands in question to the proper parties as owners thereof as between plaintiffs, defendants, intervenors and third-party defendant, the State of Mississippi.

WHEREFORE, third-party plaintiffs, the State of Louisiana and the Lake Providence Port Commission, respectfully pray for judgment against third-party defendant, the State of Mississippi, as follows:

(1) That upon a final hearing hereof, judgment be entered determining the proper boundary line between the State of Louisiana and the State of Mississippi for all time periods pertinent to the issues set forth herein, according to the acts of Congress setting forth the boundaries and determination of boundaries between said two states, including application of the Equal Footing Doctrine; the Treaty of Peace concluded between the United States and Great Britain, September 3, 1783, 8 Stat. 80, and an act of Congress approved April 6, 1812, admitting the State of Louisiana into the Union of the United States

of America, United States Statutes at Large, Chapter 50, Volume 2, page 701, and other applicable law involving the question of boundary determination;

(2) That upon a final hearing thereof, judgment be entered in this cause adjudicating the lands in question to the proper parties as owners thereof, as between plaintiffs, defendants, intervenors and third-party defendant, the State of Mississippi, and further declaring the rights and other legal relations as between the parties; and

(3) For such other relief as this Court may deem appropriate.

Respectfully submitted,

STATE OF LOUISIANA

/s/ William J. Guste
WILLIAM J. GUSTE, Jr.
Attorney General

/s/ Gary L. Keyser
GARY L. KEYSER, Lead Counsel
Assistant Attorney General
7434 Perkins Road, Suite C
Baton Rouge, Louisiana 70808
(504) 765-2416

Please Serve:

Plaintiffs, through counsel of record:

Mr. Robert R. Bailess
Mr. Geoffrey C. Morgan
WHEELLESS, BEANLAND, SHAPPLEY
& BAILESS
Post Office Box 991
Vicksburg, MS 39180

Defendants, through counsel of record:

Mr. George F. Fox, Jr.
McINTOSH, FOX & LANCASTER
301 Morgan Street
Lake Providence, LA 71254

Third-Party Defendant, State of Mississippi through:

Honorable William A. Allain
Governor of Mississippi
Post Office Box 139
Jackson, Mississippi 39205

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL,
PLAINTIFFS

V. CIVIL ACTION
RUTH M. THOMAS, ET AL, NO. W 86-0080(B)
DEFENDANTS

ANSWER OF THE STATE OF MISSISSIPPI
TO THIRD-PARTY COMPLAINT

COMES NOW the State of Mississippi by and through Mike Moore, Attorney General of the State of Mississippi and in response to the Third-Party Complaint filed herein in the above styled and numbered cause would answer as follows:

FIRST DEFENSE

1. The third-party Defendant admits the allegations contained in paragraph 1.
2. The third-party Defendant admits the allegations contained in paragraph 2.
3. The third-party Defendant admits the allegations contained in paragraph 3.
4. The third-party Defendant admits the allegations contained in paragraph 4.
5. The third-party Defendant denies the allegations in paragraph 5 except that the third-party Defendant admits that an interpretation of applicable doctrines and

treaties and determination of the boundary between the State of Mississippi and the State of Louisiana must be made pursuant to the Constitution of the United States and applicable federal law.

6. The third-party Defendant admits the allegations in paragraph 6.

7. The third-party Defendant admits the allegations in paragraph 7.

8. The third-party Defendant admits that paragraph 8 of the Third-Party Complaint states the legal position of the State of Louisiana but denies the material allegations of paragraph 8 of the Third-Party Complaint.

9. The third-party Defendant admits the allegations in paragraph 9.

SECOND DEFENSE

The property which is the subject of this litigation is located in the State of Mississippi pursuant to the Act of Congress approved March 1, 1817, admitting the State of Mississippi to the Union of the United States of America, which Act is found at 3 Stat. 348, Chapter 23; the Equal Footing Doctrine; and the Treaty of Peace concluded between the United States and Great Britain on September 3, 1783, 8 Stat. 80. This property is, therefore, subject to the exclusive and complete jurisdiction of the State of Mississippi.

WHEREFORE, PREMISES CONSIDERED, the third-party Defendant respectfully prays that this Court will (1) adjudicate and declare that the subject lands are located

within the territorial boundaries of the State of Mississippi; (2) adjudicate and declare the proper boundary line between the State of Louisiana and the State of Mississippi according to all applicable law; (3) adjudicate the lands in question to the proper parties as owners thereof, as between Plaintiff and Defendant, Intervenor and third-party Defendant and (4) for such other and further relief as this Court may deem proper, equitable and just.

Respectfully submitted,

STATE OF MISSISSIPPI

MIKE MOORE
ATTORNEY GENERAL

FRANK SPENCER
ASSISTANT ATTORNEY
GENERAL

BY: Helen Wetherbee
Helen Wetherbee
Special Assistant Attorney
General

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL.

VERSUS

CIVIL ACTION

RUTH M. THOMAS, ET AL.

NO. W86-0080(B)

MOTION FOR SEPARATE TRIAL OF
INTERSTATE BOUNDARY ISSUE

NOW INTO COURT, comes the State of Louisiana and the Lake Providence Port Commission, intervenors in the above entitled cause, who move the Court to order, pursuant to Rule 42(b) and 20(b) of the Federal Rules of Civil Procedure (28 USCA) that the issue of the location of the legal boundary between the States of Mississippi and Louisiana be the subject of a special proceeding separate and apart from and in advance of the determination of the issues of ownership and possession of the original Island Ninety-Four (94) and/or the accretionary features or islands against the west bank of the river in the vicinity of Lake Providence, Louisiana.

Intervenor move the Court for a separate trial of the interstate boundary issue on the ground that the separate trial will expedite a determination of all issues; will permit a more orderly disposition of the case by avoidance of confusion on the competing issues of ownership and possessory acts; will assist the Court in defining the limits of its jurisdiction; will reduce the inconvenience to the parties and to the Court; and may well reduce the

expenses to all concerned, as well as the time required by the Court.

Respectfully submitted,
 WILLIAM J. GUSTE, JR.
 Attorney General
 GARY L. KEYSER
 Assistant Attorney General
 DAVID C. KIMMEL
 Assistant Attorney General
 H. GLEN KENT, JR.
 Special Assistant Attorney
 General

BY: Gary L. Keyser
 GARY L. KEYSER
 Assistant Attorney General
 Post Office Box 94095
 Baton Rouge, LA 70804-9095
 (504) 342-7900

IN THE UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF MISSISSIPPI
 WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL.

VERSUS

CIVIL ACTION

RUTH M. THOMAS, ET AL. NO. W86-0080(B)

MEMORANDUM IN SUPPORT OF
INTERVENORS' MOTION FOR SEPARATE TRIAL OF
INTERSTATE BOUNDARY ISSUE

MAY IT PLEASE THE COURT:

The original complaint filed herein is styled as a Complaint to Remove Cloud and identifies numerous plaintiffs as the owners in fee simple title of a certain tract of land purportedly lying in Mississippi, described with particularity in paragraph 52 of the complaint.

Complainants recite their title as having derived from patents of the United States of America, subsequently recorded in Mississippi. Thereafter, complainants allege that Stack Island was affected by the divided flows of the Mississippi River into the natural erosion and accretion processes of the river, gradually migrating southward and westward.

Intervenors show the Court that the Stack Island now existing in the vicinity of the *east* bank of the Mississippi River is in approximately the same location as the original Stack Island patented by the United States on December 29, 1888 to Stephen B. Blackwell, both of said islands being located in Township 11 North, Range 9 West of Choctaw Meridian, Mississippi.

The two accretionary features adjacent to the *west* bank of the Mississippi River at Lake Providence, Louisiana, are entirely different island formations from the original No. Ninety-Four (94), as well as the currently existing Stack Island adjacent to the *east* bank of the Mississippi River.

Intervenors show the Court that where a river such as the Mississippi River forms the boundary between two states, the thalweg defines the boundary, and the ordinary course of traffic on the river defines the thalweg, except where a former thalweg has become dead or frozen. Where there is a live thalweg, it determines the boundary between states.

The determination of the legal boundary between the states by the Court will determine the limits of the jurisdiction of the Court, and may result in a determination that the ownership of the property in question is outside the limits of the Court's jurisdiction. Louisiana contends that the thalweg defines the boundary between the two states and that the legal thalweg at the time of the federal patent of Island No. Ninety-Four (94) was east of the island and became immobilized there by an avulsive change in the river. Accordingly, if the Court makes this finding as to the legal boundary, it may not have jurisdiction to make a determination regarding the ownership of the original Island No. Ninety-Four (94) or the accretionary features against the west bank of the river in the vicinity of Lake Providence, Louisiana. Similarly, the Court may not have jurisdiction unless it determines that the legal thalweg is west of the accretionary features against the west bank of the river, placing it somewhere

near or west of the westerly levee of the Mississippi River.

Consequently, it is felt that the Court and the parties will avoid much delay, inconvenience and expense and the proceedings will be simplified and a more orderly disposition of the case permitted by a separate trial of the boundary issue in advance of the issues of ownership and possessory acts. All of the maps, hydrographic charts and other boundary-related exhibits will be offered whether or not the case is bifurcated, but in the event the Court determines that the legal boundary between the two states has for all pertinent periods of time been east of Island No. Ninety-Four (94), it will be unnecessary for the parties to put on voluminous evidence concerning alleged acts of ownership and possession.

This evidence includes numerous deeds and records from the several parties pertaining to both Mississippi and Louisiana residents; oil and gas leases; hunting and agricultural leases; letters; tax bills and receipts; and other documents requiring testimonial identification.

Parenthetically, purported evidence of ownership and possession will be unnecessary should the Court determine that the property at issue is outside the jurisdictional limits of the Court.

Of course, both Mississippi and Louisiana will introduce documentary evidence and testimony concerning acts of ownership and possession, as will the Board of Commissioners for the Fifth Louisiana Levee District, recently made a defendant in the case.

The presentation of such evidence will add days of time to the trial, and may be unnecessary. At the very least, the suggested bifurcation will have the effect of reducing the need for some testimony and exhibits, and, thus, the length of the trial.

Most importantly, the suggested bifurcation will permit a more orderly disposition of the case by allowing the parties to litigate one issue at a time, rather than interjecting all elements of boundary, ownership and title and all testimony and evidence pertinent to each at one time. For instance, the plaintiff would be obligated to go forward on all three issues and present evidence on all at one time, and the opposing parties would likewise be compelled to go forward on all issues, when much of this may be unnecessary in the light of the supervening issue of boundary.

It is submitted that the most efficient and orderly procedure for handling the case would be to make the interstate boundary issue the subject of a special proceeding in advance of the determination of the issues of ownership and possession. Nothing would be lost to any party in following such a procedure, regardless of what determination might be made as to the boundary, because evidence and testimony concerning the issues of ownership and possession could and should follow logically behind the boundary question.

Accordingly, movants pray that the Court enter an order herein for a separate trial on the issue of the location of the legal boundary between the States of Mississippi and Louisiana, to be held in advance of the determination of the issues of ownership and possession

of the original Island No. Ninety-Four (94) and/or the accretionary features or islands against the west bank of the river in the vicinity of Lake Providence, Louisiana.

It is respectfully submitted that the separate trial requested will expedite a determination of all issues and will permit a more orderly disposition of the case. Additionally, it will assist the Court in defining the limits of its jurisdiction and will reduce the inconvenience to the parties and to the Court in trying all issues simultaneously.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

GARY L. KEYSER
Assistant Attorney General

DAVID C. KIMMEL
Assistant Attorney General

H. GLEN KENT, JR.
Special Assistant Attorney
General

BY: Gary L. Keyser
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Post Office Box 94095
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL PLAINTIFFS
CIVIL ACTION
NO. W86-0080(B)

VS.

RUTH M. THOMAS, ET AL DEFENDANTS

ORDER

(Filed May 5, 1989)

* * *

1. This cause shall be bifurcated and separated into two trials, the first of the said trials shall be for the purpose of determining the location of the state boundary line between the State of Mississippi and the State of Louisiana, with regard to the property involved in this cause, and all issues relative thereto shall be heard by this Court beginning June 19, 1989 to determine the said state boundary line.

2. With regard to the first said trial, the State of Louisiana and the Lake Providence Port Commission are each hereby ordered to file separate motions and statements of position of what specific interest the State of Louisiana and the Lake Providence Port Commission has acquired by quitclaim deeds from defendants in this cause, said motions and statements to be filed in order for this Court to determine which defendants, if any, should be dismissed as a result of the execution of the said quitclaim deeds to the Lake Providence Port Commission and which said defendants should remain parties.

3. The said State of Louisiana and the Lake Providence Port Commission shall each file a statement of position with regard to whether the State of Louisiana and/or the Lake Providence Port Commission claim any interest in property that is the subject of this suit if this Court determines that the subject property lies within the State of Mississippi. The State of Louisiana and the Lake Providence Port Commission are each also hereby ordered to make a separate definite statement of the specific claims, if any, of the State of Louisiana and the Lake Providence Port Commission to the said property if it is determined by this Court to lie within the State of Mississippi. All of the filing referred to above in all preceding paragraphs shall be accomplished by the State of Louisiana and the Lake Providence Port Commission by May 16, 1989 by filing with the Clerk and by forwarding copies to all counsel of record.

4. The second trial, if necessary, shall be set by the Court after the conclusion of the first trial.

* * *

SO ORDERED AND ADJUDGED, this 5th day of May, 1989.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.

Clarence A. Pierce, CLERK

By:

/s/ Ann Nelson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL.

CIVIL ACTION
NO. W86-0080(B)

VERSUS

RUTH M. THOMAS, ET AL.

STATEMENT OF POSITION OF THE STATE OF LOUISIANA AND LAKE PROVIDENCE PORT COMMISSION

NOW INTO COURT, come the State of Louisiana and the Lake Providence Port Commission, Intervenor in the above entitled cause, who, pursuant to the oral orders of this Court of May 1, 1989, make this statement of position with regard to their claims to property which may be affected by a determination of the location of the legal boundary between the States of Mississippi and Louisiana.

It is the position of Intervenor that the boundary between the states lies along the thalweg, and the ordinary course of traffic on the river for all pertinent periods of time defines the thalweg, except where a former thalweg has become dead or frozen. An avulsive change occurred in 1882 when the tract of navigation or thalweg of the Mississippi River was suddenly and avulsively diverted from east channel Stack Island Chute on the Mississippi side of Stack Island to the Louisiana side of Stack Island by the construction of dikes across the head of the chute. The thalweg was thus immobilized in east

Stack Island Chute, freezing the boundary in that location.

As a general proposition, the thalweg lies in the middle of the main navigation channel of the Mississippi River as the main navigation channel exists today, subject to the avulsive change which took place in 1882, as described above. Intervenor would not accept any other boundary as being the true legal boundary between the states.

Consequently, Intervenor claim all accretion, all island formations and the accretionary features adjacent to the west bank of the Mississippi River, all lying west of the main navigation channel and formed in the bed and bottom of that portion of the Mississippi River owned by Louisiana by its inherent sovereignty.

Intervenor do not claim the currently existing Stack Island adjacent to the east bank of the Mississippi River

in the same location as the original Stack Island patented to Stephen B. Blackwell in 1888.

Respectfully submitted,
 WILLIAM J. GUSTE, JR.
 Attorney General
 GARY L. KEYSER
 Assistant Attorney General
 DAVID C. KIMMEL
 Assistant Attorney General
 H. GLEN KENT, JR.
 Special Assistant Attorney
 General

BY: /s/ Gary L. Keyser
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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF MISSISSIPPI
 WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL.

CIVIL ACTION
 NO. W86-0080(B)

VERSUS

RUTH M. THOMAS, ET AL.

SUPPLEMENTAL STATEMENT OF POSITION OF THE
STATE OF LOUISIANA AND LAKE PROVIDENCE PORT
COMMISSION

NOW INTO COURT, come the State of Louisiana and the Lake Providence Port Commission, Intervenor in the above entitled cause, who, pursuant to the orders of this Court of May 5, 1989, make this supplemental statement of position with regard to their claims to property which may be affected by a determination of the location of the legal boundary between the States of Mississippi and Louisiana.

Intervenors reiterate all prior claims and statement of position regarding the boundary between the states.

Intervenors claim all accretion, all island formations and the accretionary features adjacent to the west bank of the Mississippi River, all lying west of the main navigation channel and formed in the bed and bottom of that portion of the Mississippi River owned by Louisiana by its inherent sovereignty.

Furthermore, Intervenor asserts a claim of possession and ownership to the currently existing Stack Island/

Bailshed [sic] Toehead lying in proximity to the east bank of the Mississippi River in the same location as the original Stack Island patented to Stephen B. Blackwell in 1888. It has been determined that the avulsive change which occurred in 1882 immobilized the thalweg boundary in East Stack Island chute. Subsequently, the Stack Island formation existing in 1882 disappeared and reappeared, again west of the said frozen boundary. Consequently, the Stack Island/Bails Headtoe Head [sic] accretionary formation now existing has formed in the bed and bottom of the Mississippi River lying within the sovereign territory of Louisiana. As a consequence, any prior ownership was lost and regained by Louisiana upon the re-emergence of the accretionary formation within the sovereign territory of Louisiana, pursuant to the Equal Footing Doctrine.

Further, Intervenor, the State of Louisiana, shows the Court that the long continued possession by Louisiana residents over the accretionary formations to their riparian property on the west bank of the Mississippi River together with the long continued exercise of possession and jurisdiction by the State of Louisiana over the developing island formations in the Mississippi River, and the acquiescence in such possession, ownership and exercise of such Louisiana jurisdiction by the State of Mississippi and its resident shows conclusively that the de facto and de jure exercise of sovereignty and dominion over the said accretionary lands is with the State of Louisiana.

Intervenor, the State of Louisiana, further shows that by Act No. 44 of the Acts of the General Assembly of the State of Louisiana, approved July 2, 1886, and by Act No. 191 of the General Assembly of the State of Louisiana, approved July 6, 1908, it has clearly and unequivocally

exercised possession, ownership, jurisdiction, regulation and dominion over the accreted lands in question. As will be seen by a reading of Act 191 of the 1908 Regular Session, all lands belonging to the State of Louisiana embraced in the original grants by Congress to the State of Louisiana for levee and drainage purposes located within the parishes of the Fifth Louisiana Levee District were transferred to the said district, including all islands formed in the bed of the Mississippi River.

Further, the Louisiana Supreme Court, in *State ex rel. Board of Commissioners for Fifth Louisiana Levee District v. Capdevielle*, 54 So. 820 (Sup. Ct. 1911), recognized that Act 191 of 1908 granted to the Board of Commissioners for the Fifth Louisiana Levee District all islands in the Mississippi River within the limits of the Parishes of East Carroll, Madison, Tensas and Concordia. The islands thereby transferred are shown on the index to islands in the Mississippi River owned by the Fifth Louisiana Levee District, being numbered 1-20, several of which are in the vicinity of this controversy.

Therefore, all such islands and other lands which formerly constituted or were a part of the bed of the Mississippi River have been granted to the Board of Commissioners for the Fifth Louisiana Levee District, a political subdivision of the State of Louisiana. This transfer of ownership and the assertion of jurisdiction, possession and ownership of the said Fifth Louisiana Levee District has never been questioned by plaintiffs or by the State of Mississippi.

Consequently, Intervenor claim all accretion, all island formations, all accretionary features and all sand

bars lying west of the main navigation channel and/or thalweg of the Mississippi River, which are owned by Louisiana by virtue of its inherent sovereignty.

Respectfully submitted,
 WILLIAM J. GUSTE, JR.
 Attorney General
 GARY L. KEYSER
 Assistant Attorney General
 DAVID C. KIMMEL
 Assistant Attorney General
 H. GLEN KENT, JR.
 Special Assistant Attorney
 General

BY: /s/ Gary L. Keyser
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 Post Office Box 94095
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IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF
 MISSISSIPPI, WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL PLAINTIFFS
 VS. CIVIL ACTION NO. W86-0080(B)
 RUTH M. THOMAS, ET AL DEFENDANTS

PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE PLAINTIFFS
 [Submitted in June 1989]

FINDINGS OF FACT

1. Island Number 94, the property known as Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward until it reached its present location. Further, from the time of the formation of Stack Island, the island and its accretions have been bounded on the West by the Mississippi River channel thalweg-interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed that lies entirely within Mississippi.

2. After about 1908, the River gradually enlarged the bounding chute channel East. Further, in about the year 1913, the enlarging Mississippi chute channel was adopted for navigation.

3. After about the year 1925, the bounding Mississippi chute channel continued to enlarge and flows increased therein with corresponding lessening of flows

in the Mississippi-Louisiana boundary channel on the West. Further, by about 1934, divided flow conditions were favorable for the formation of accretions to the foot of Stack Island and for the river to gradually and finally abandon the old Mississippi-Louisiana channel West of Stack Island. By the year 1954, this old abandoned channel had become attenuated and filled by alluvium (silt and sand). By the year 1962, the old channel along Haganman Revetment in Lake Providence Bend became attenuated and filled by alluvium.

4. The enlargement of the former East chute channel of the Mississippi River and the corresponding abandonment of the West bounding channel was avulsive in nature and did not operate to change the ownership of the property of Plaintiffs but, by reason of the said avulsive action, the Mississippi-Louisiana state boundary became firmly and finally fixed along the locus of the middle of the former main navigation channel, sometimes called the thalweg, which former channel is identical with the West boundary of the lands of Plaintiffs, known as Stack Island, and as described in Paragraph 52 of the Complaint.

5. The Plaintiffs and their predecessors in title have, for more than ninety years next preceding the filing of the Complaint, been in the exclusive uninterrupted, hostile, open and notorious possession of Stack Island and accretions thereto claiming to own them as against the world. The acts of possession exercised over the said lands by Plaintiffs and their predecessors in title, among others, have consisted of the payment of taxes on said lands, the cutting of timber therefrom, the posting of said land against trespassers, the leasing of said land for grazing

purposes, the leasing of said land for hunting purposes, the granting of an oil, gas and mineral lease, and the cultivation thereof. The possession of Plaintiffs and their claim of ownership to the said property has been well known and recognized in the community, both in Mississippi and in Louisiana.

6. Plaintiff, Ruth H. Baker, and the other plaintiffs' predecessor in title brought an action in the Chancery Court of Issaquena County, Mississippi to quiet their title to the aforesaid lands naming as defendants the then owners of the adjoining Louisiana lands. A Final Decree was entered on May 7, 1968 adjudging that none of the defendants named therein had any right, title or interest in the subject lands and any claims thereto asserted by the defendants were cancelled. The said Final Decree is res judicata against the said defendants named in the final decree.

7. The said westerly boundary of the property of Plaintiffs has been long recognized and acquiesced in as the boundary between the Plaintiffs and the Louisiana landowners and as to the State of Louisiana.

8. Stack Island, Island No. 94, has long been recognized and acquiesced in as being in the State of Mississippi. The State of Mississippi has long exercised sovereignty and dominion over Stack Island and Louisiana has acquiesced in the possession and exercise of sovereignty and dominion by the State of Mississippi and citizens of the State of Mississippi.

CONCLUSIONS OF LAW

1. When a navigable river constitutes the boundary between two states, the thalweg defines the boundary. The thalweg is the lowest part of the river bed in the direction of its flow, or the deep channel of the river. If there be more than one channel of a river, the deepest channel is regarded as the navigable channel for the purpose of territorial demarcation; and the boundary line will be drawn along the surface of the stream corresponding to the line of deepest depression in the bed of the river.

2. If a river suddenly abandons its navigation course or thalweg and forms a new one by the process known as avulsion, the resulting change of the thalweg works no change of the boundary although water may be flowing in it and irrespective of subsequent changes in the new channel. So long as the channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end. This avulsive change in the thalweg establishes a fixed boundary in the abandoned channel at the deepest part of the abandoned channel. This fixed boundary becomes fixed in the deepest part of the bed of the abandoned channel when the water ceases to flow in the abandoned channel. The bed which the river has abandoned becomes the boundary, and remains the property of the former owner of the river, and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the state in which it flows.

3. When a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation.

Islands are within the territorial limits of the state as bounded by rivers or other waters in the same manner as is the mainland of that state.

Additions to an island by gradual processes should be treated as part of the island and as subject to the same jurisdiction.

The fact that an island at no time since the admission into a state has entirely disappeared, but changes have been caused by processes of erosion and accretion, allows the island to remain under the jurisdiction of the state into which it was admitted.

Once the navigation channel of the river abandons the old channel around an island, the state boundary remains as it was prior to the change. The state boundary line does not become fixed until the water in the old

channel ceases to flow as a running stream and becomes stagnant.

So long as the channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel.

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them.

4. Land formations appearing or forming on the river are owned by the owner of the bed of the river.

5. Lands forming by the process of accretions within the State of Louisiana are the property of the riparian owner only when the accretions are formed by the deposition of the alluvium against the bank of the river.

6. Accretions to land formed within the State of Mississippi belong either to the owner of the bank against

which accretions begin to form or else to the riparian owner by virtue of ownership of the river bed out to the state boundary line thalweg.

7. Accretions may be defined as an addition to riparian land, generally and imperceptibly [sic] made by the water to which the land is contiguous. It is different from reliction and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same.

8. The United States of America surveyed Island No. 94, Stack Island, as being located within the State of Mississippi in 1881. The property known as Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of the River and was gradually, progressively and imperceptively enlarged southward and westward until it reached its present location. Stack Island and its accretions have been bounded on the west by the Mississippi river channel thalweg-interstate boundary and bounded on the east by the chute channel. The fixed state boundary is identical with the west bounds of Stack Island as described in Paragraph 52 of the Complaint.

9. The Plaintiffs own Stack Island and its accretions as against the world.

10. The Final Decree of the Chancery Court of Issaquena County, Mississippi, entered on May 7, 1968, is res

11. The long acquiescence by one state in the possession of territory by another state and by citizens of said second state and in the exercise of sovereignty and dominion over it is conclusive of the latter state's title and rightful authority. Stack Island and the westerly boundary of the property of Plaintiffs has been long recognized and acquiesced in as the property of the Plaintiffs with the old abandoned bed of the river between Stack Island and the Louisiana mainland being recognized as the State boundary as well as the private boundary between the Plaintiffs and the Louisiana landowners.

12. None of the defendants or the intervenors have any right, title or interest in the lands known as Stack Island and as described in Paragraph 52 of the Complaint and all clouds heretofore existing on the title of plaintiffs in and to said property as against all claims of the defendants or intervenors are removed and cancelled.

13. By virtue of the long continued possession by Mississippi plaintiffs, there is a presumption of a lost grant from the State of Louisiana to Plaintiffs' predecessors in title.

Respectfully submitted,
/s/ Robert R. Bailess
ROBERT R. BAILESS
Attorney for Plaintiffs

JULIA DONELSON HOUSTON, ET AL PLAINTIFFS
VS. CIVIL ACTION NO. W86-0080(B)
RUTH M. THOMAS, ET AL DEFENDANTS

PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE PLAINTIFFS
[Submitted in March 1989]

FINDINGS OF FACT

1. Island Number 94, the property known as Stack Island, Mississippi, was subject to the dividend flows of the Mississippi River and to the natural erosion and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward until it reached its present location. Further, from the time of the formation of Stack Island, the island and its accretions have been bounded on the West by the Mississippi River channel thalweg-interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed that lies entirely within Mississippi.

2. After about 1908, the River gradually enlarged the bounding chute channel East. Further, in about the year 1913, the enlarging Mississippi chute channel was adopted for navigation.

3. After about the year 1925, the bounding Mississippi chute channel continued to enlarge and flows increased therein with corresponding lessening of flows in the Mississippi-Louisiana boundary channel on the

West. Further, by about 1934, divided flow conditions were favorable for the formation of accretions to the foot of Stack Island and for the river to gradually and finally abandon the old Mississippi-Louisiana channel West of Stack Island. By the year 1954, this old abandoned channel had become attenuated and filled by alluvium (silt and sand). By the year 1962, the old channel along Haganman Revetment in Lake Providence Bend became attenuated and filled by alluvium.

4. The enlargement of the former East chute channel of the Mississippi River and the corresponding abandonment of the West bounding channel *was avulsive in nature* and did not operate to change the ownership of the property of Plaintiffs but, by reason of the said avulsive action, the Mississippi-Louisiana state boundary became firmly and finally fixed along the locus of the middle of the former main navigation channel, sometimes called the thalweg, which former channel is identical with the West boundary of the lands of Plaintiffs, known as Stack Island, and as described in Paragraph 52 of the Complaint.

5. The Plaintiffs and their predecessors in title have, for more than ninety years next preceding the filing of the Complaint, been in the exclusive uninterrupted, hostile, open and notorious possession of Stack Island and accretions thereto claiming to own them as against the world. The acts of possession exercised over the said lands by Plaintiffs and their predecessors in title, among others, have consisted of the payment of taxes on said lands, the cutting of timber therefrom, the posting of said land against trespassers, the leasing of said land for grazing purposes, the leasing of said land for hunting purposes,

the granting of an oil, gas and mineral lease, and the cultivation thereof. The possession of Plaintiffs and their claim of ownership to the said property has been well known and recognized in the community, both in Mississippi and in Louisiana.

6. Plaintiff, Ruth H. Baker, and the other plaintiffs' predecessor in title brought an action in the Chancery Court of Issaquena County, Mississippi to quiet their title to the aforesaid lands naming as defendants the then owners of the adjoining Louisiana lands. A Final Decree was entered on May 7, 1968 adjudging that none of the defendants named therein had any right, title or interest in the subject lands and any claims thereto asserted by the defendants were cancelled. The said Final Decree is *res judicata* against the said defendants named in the final decree.

7. The said westerly boundary of the property of Plaintiffs has been long recognized and acquiesced in as the boundary between the Plaintiffs and the Louisiana landowners and as to the State of Louisiana.

CONCLUSIONS OF LAW

1. When a navigable river constitutes the boundary between two states, the thalweg defines the boundary. The thalweg is the lowest part of the river bed in the direction of its flow, or the deep channel of the river. If there be more than one channel of a river, the deepest channel is regarded as the navigable channel for the purpose of territorial demarcation; and the boundary line

will be drawn along the surface of the stream corresponding to the line of the deepest depression in the bed of the river.

2. If a river suddenly abandons its navigation course or thalweg and forms a new one by the process known as avulsion, the resulting change of the thalweg works no change of the boundary although water may be flowing in it and irrespective of subsequent changes in the new channel. So long as the channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end. This avulsive change in the thalweg establishes a fixed boundary in the abandoned channel at the deepest part of the abandoned channel. This fixed boundary becomes fixed in the deepest part of the bed of the abandoned channel when the water ceases to flow in the abandoned channel. The bed which the river has abandoned becomes the boundary, and remains the property of the former owner of the river, and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the state in which it flows.

3. Land formations appearing or forming on the river are owned by the owner of the bed of the river.

4. Lands forming by the process of accretions within the State of Louisiana are the property of the riparian owner only when the accretions are formed by the deposition of alluvium against the bank of the river.

5. Accretions to land formed within the State of Mississippi belong either to the owner of the bank against

which accretions begin to form or else to the riparian owner by virtue of ownership of the river bed out to the state boundary line thalweg.

6. Accretions may be defined as an addition to riparian land, generally and imperceptibly made by the water to which the land is contiguous. It is different from reliction and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same.

7. The United States of America surveyed Island No. 94, Stack Island, as being located within the State of Mississippi in 1881. The property known as Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of the River and was gradually, progressively and imperceptively enlarged southward and westward until it reached its present location. Stack Island and its accretions have been bounded on the west by the Mississippi river channel thalweg-interstate boundary and bounded on the east by the chute channel. The fixed state boundary is identical with the west bounds of Stack Island as described in Paragraph 52 of the Complaint.

8. The Plaintiffs own Stack Island and its accretions as against the world.

9. The Final Decree of the Chancery Court of Issaquena County, Mississippi, entered on May 7, 1968, is res

judicata against the defendants named in the said Final Decree.

10. The long acquiescence by one state in the possession of territory by another state and by citizens of said second state and in the exercise of sovereignty and dominion over it is conclusive of the latter state's title and rightful authority. The westerly boundary of the property of Plaintiffs has been long recognized and acquiesced in as the property of the owners of Stack Island with the old abandoned bed of the river between Stack Island and the Louisiana mainland being recognized as the State boundary as well as the private boundary between the Plaintiffs and the Louisiana landowners.

11. None of the defendants or the intervenors have any right, title or interest in the lands known as Stack Island and as described in Paragraph 52 of the Complaint and all clouds heretofore existing on the title of plaintiffs in and to said property as against all claims of the defendants or intervenors are removed and cancelled.

12. By virtue of the long continued possession by Mississippi plaintiffs, there is a presumption of a lost grant from the State of Louisiana to Plaintiffs' predecessors in title.

Respectfully submitted,

/s/ Robert R. Bailess
ROBERT R. BAILESS
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL. PLAINTIFFS
vs. CIVIL ACTION NO. W86-0080(B)
RUTH M. THOMAS, ET AL. DEFENDANTS

STATE OF MISSISSIPPI'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Island Number 94, the property known as Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of this dynamic alluvial river, and was gradually, progressively and imperceptibly enlarged southward and westward until it reached its present location. Further, from the time of the formation of Stack Island, the island and its accretions have been bounded on the West by the Mississippi River channel thalweg-interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed that lies entirely within Mississippi.

2. After about 1908, the River gradually enlarged the bounding chute channel East. Further, in about the year 1913, the enlarging Mississippi chute channel was adopted for navigation.

3. After about the year 1925, the bounding Mississippi chute channel continued to enlarge and flows increased therein with corresponding lessening of flows in the Mississippi-Louisiana boundary channel on the

West. Further, by about 1934, divided flow conditions were favorable for the formation of accretions to the foot of Stack Island and for the river to gradually and finally abandon the old Mississippi-Louisiana channel West of Stack Island. By the year 1954, this old abandoned channel had become attenuated and filled by alluvium (silt and sand). By the year 1962, the old channel along Haganman Revetment in Lake Providence Bend became attenuated and filled by alluvium.

4. The enlargement of the former East chute channel of the Mississippi River and the corresponding abandonment of the West bounding channel was avulsive in nature and did not operate to change the ownership of the property of Plaintiffs but, by reason of the said avulsive action, the Mississippi-Louisiana state boundary became firmly and finally fixed along the locus of the middle of the former main navigation channel, sometimes called the thalweg, which former channel is identical with the West boundary of the lands of Plaintiffs, known as Stack Island, and as described in Paragraph 52 of the Complaint.

5. The said westerly boundary of the property of Plaintiffs has been long recognized and acquiesced in as the boundary between Mississippi and Louisiana.

CONCLUSIONS OF LAW

1. When a navigable river constitutes the boundary between two states, the thalweg defines the boundary. The thalweg is the lowest part of the river bed in the direction of its flow, or the deep channel of the river. If there be more than one channel of a river, the deepest

channel is regarded as the navigable channel for the purpose of territorial demarcation; and the boundary line will be drawn along the surface of the stream corresponding to the line of deepest depression in the bed of the river.

2. If a river suddenly abandons its navigation course or thalweg and forms a new one by the process known as avulsion, the resulting change of the thalweg works no change of the boundary although water may be flowing in it and irrespective of subsequent changes in the new channel. So long as the channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end. This avulsive change in the thalweg establishes a fixed boundary in the abandoned channel at the deepest part of the abandoned channel. This fixed boundary becomes fixed in the deepest part of the bed of the abandoned channel when the water ceases to flow in the abandoned channel. The bed which the river has abandoned becomes the boundary, and remains the property of the former owner of the river, and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the state in which it flows.

3. Accretions may be defined as an addition to riparian land, generally and imperceptibly made by the water to which the land is contiguous. It is different from reliction and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it

while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same.

4. The United States of America surveyed Island No. 94, Stack Island, as being located within the State of Mississippi in 1881. The property known as Stack Island, Mississippi, was subject to the divided flows of the Mississippi River and to the natural erosion and accretion processes of the River and was gradually, progressively and imperceptively enlarged southward and westward until it reached its present location. Stack Island and its accretions have been bounded on the west by the Mississippi River channel thalweg-interstate boundary and bounded on the east by the chute channel. The fixed state boundary is identical with the west bounds of Stack Island as described in Paragraph 52 of the Complaint.

5. The long acquiescence by one state in the possession of territory by another state and by citizens of said second state and in the exercise of sovereignty and dominion over it is conclusive of the latter state's title and rightful authority. The westerly boundary of the property of Plaintiffs has been long recognized and acquiesced in as the property of the owners of Stack Island with the old abandoned bed of the river between Stack Island and the Louisiana mainland being recognized as the State boundary as well as the private boundary between the Plaintiffs and the Louisiana landowners.

6. None of the defendants or the intervenors have any right, title or interest in the lands known as Stack

Island and as described in Paragraph 52 of the Complaint.

Respectfully submitted,

/s/ Robert E. Sanders
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 Special Assistant Attorney
 General
 Attorney for State of
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CERTIFICATE OF SERVICE

This is to certify that I, Robert E. Sanders, a Special Assistant Attorney General for the State of Mississippi, have caused to be mailed this date, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing **State of Mississippi's Proposed Findings of Fact and Conclusions of Law** to the following:

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This, the 7th day of March, 1989.

/s/ Robert E. Sanders
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON,
ET AL.

CIVIL ACTION NO. W86-0080(B)

VERSUS

RUTH M. THOMAS, ET AL.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF THE STATE OF LOUISIANA AND LAKE
PROVIDENCE PORT COMMISSION

FINDINGS OF FACT:

1. Island No. Ninety-Four (94) in the Mississippi River patented by the United States on December 29, 1888 to Stephen B. Blackwell, located in Township 11 North, Range 9 West of Choctaw Meridian in Mississippi, containing one hundred seventeen and ninety-six hundredths (117.96) acres has been eroded away by the natural processes of the Mississippi River and no longer exists at its location at the time of the federal patent, as aforesaid.

2. The two accretionary features adjacent to the west bank of the Mississippi River at Lake Providence, Louisiana, sometimes referred to as "Stack Island" are entirely different island formations from the original Island No. Ninety-Four (94) and are located in a different geographic vicinity; they have different histories of origin; they are different in size and shape; and at all times since their formation in the 1930's, have been west of the boundary between the States of Louisiana and Mississippi.

3. At the time of its survey in 1881, the then-existing Island No. Ninety-Four (94) was subject to the divided flows of the Mississippi River, with the thalweg or track of navigation forming the boundary between the two states located in the east channel Stack Island Chute, thereby placing the island in Louisiana. The U.S. Deputy Surveyor, however, erroneously placed Stack Island in Mississippi, and on this basis a federal patent was issued to Stephen B. Blackwell.

4. In 1882, the track of navigation or thalweg of the Mississippi River was suddenly, perceptibly and avulsively diverted from east channel Stack Island Chute on the Mississippi side of Stack Island to the Louisiana side of said Stack Island by the construction of dikes across the head of such chute or channel. The purpose of this avulsive act by the Mississippi River Commission was to stop local bank caving on the Mississippi Shore; to improve channel alignment; and to facilitate navigation at low water stages.

5. After the construction of the dikes and the diversion in 1882, the thalweg of the Mississippi River remained fixed in the east channel Stack Island Chute, immobilized by the avulsive shift in the river. Upper and lower segments of the thalweg slowly and imperceptibly migrated back and forth in the Mississippi River where it has remained in approximately mid-channel continuously since about 1909.

6. What is today shown as Stack Island(s) on the flood control and navigation maps of the Mississippi River published by the Mississippi River Commission is not the island originally surveyed in 1881. That original

island has appeared and disappeared from time to time in different locations, but is now totally washed away.

7. All of the accretion attached to the accretionary features now sometimes referred to as "Stack Island" since about 1909 belongs to the State of Louisiana, having been formed on the bed and banks of that portion of the Mississippi River lying in Louisiana as determined by the tracks of navigation or channel lines shown on the aforementioned Flood Control and Navigation Maps.

8. No avulsion has occurred in the Lake Providence Reach of the Mississippi River since 1882 which would freeze the boundary between the States of Louisiana and Mississippi, as claimed by plaintiff. Neither the banks of the river nor the thalweg are involved in plaintiff's claim of avulsion.

9. The Lake Providence Port is partly or wholly situated on lands surveyed by U.S. Deputy Surveyors in the period of 1824-1829. A large portion of the sections involved, Sections 1 and 2 of T10N-R13E of the Louisiana Land District North of Red River were eroded away by action of the river and subsequently restored by accretion.

10. Various agencies and instrumentalities of the State of Louisiana have exercised power, jurisdiction and dominion over the lands in question for many years, including the Lake Providence Port Commission, the Fifth Louisiana Levee District, the East Carroll Parish Sheriff's Office, the East Carroll Parish Tax Assessor's Office, the Louisiana Tax Commission, the Louisiana Department of Wildlife and Fisheries, the Louisiana Department of Public Works, the Louisiana Department

of Transportation and Development and the U.S. Army Corps of Engineers.

11. No agencies or instrumentalities of the State of Mississippi have exercised power, jurisdiction or dominion over the lands at issue.

12. Louisiana Residents have exercised ownership, power and dominion over the lands at issue, and have paid ad valorem taxes in the maintenance of their ownership to the said lands.

13. While Mississippi residents have purported to exercise ownership and/or possession over the lands at issue, they have done so in the mistaken belief that the claims of their ancestors in title to Island No. Ninety-Four (94) gave them such rights, not realizing that they were dealing with entirety [sic] different lands.

PROPOSED CONCLUSIONS OF LAW:

1. Where a river forms the boundary between two states, the thalweg defines the boundary, and the ordinary course of traffic on the river defines the thalweg, except where a former thalweg has become dead or frozen.

2. In the case of river boundaries definable by a live thalweg, the live thalweg is the boundary between states.

3. If a river suddenly abandons its navigation course or thalweg and forms a new one by the process known as avulsion, whether because of natural or artificial works, the resulting change of the main course works no change of boundary, which remains in the middle of the former channel, although water may be flowing in it.

Stated another way, an avulsive change in the main river course establishes a fixed boundary located in the center of the abandoned main channel, whether by natural or artificial works; i.e., the boundary remains as it was prior to the avulsive change, the center line of the old channel.

4. At the time of its survey in 1881, the then existing Island No. Ninety-Four (94) was subject to the divided flows of the Mississippi River, with the thalweg or track of navigation forming the boundary between the two states located in the east channel Stack Island Chute, thereby placing the land in Louisiana. The U.S. Deputy Surveyor erroneously placed Stack Island in Mississippi, and on this basis a federal patent was issued to Stephen B. Blackwell.

5. In 1882, the sudden and avulsive diversion of the Mississippi River from east channel Stack Island Chute on the Mississippi side of Stack Island to the Louisiana side of Stack Island by the construction of dikes across the head of the chute by the Mississippi River Commission caused the then existing thalweg in east channel Stack Island Chute to become dead or frozen, thus immobilizing the legal thalweg and boundary between the states.

6. Following the diversion of the live thalweg by the Mississippi River Commission construction program, the frozen thalweg remain fixed in the east channel Stack Island Chute, while the segments of the live thalweg above and below Stack Island slowly and imperceptibly migrated back and forth in the Mississippi River. The live thalweg of the Mississippi River has remained in approximately mid-channel continuously since about 1909.

7. Island No. Ninety-Four (94) in the Mississippi River, consisting of one hundred seventeen and ninety-six hundreds (117.96) acres at the time of patent in 1888 has been eroded away by the natural processes of the Mississippi River and no longer exists at its location at the time of the federal patent.

8. The two accretionary features adjacent to the west bank of the Mississippi River at Lake Providence, Louisiana, are entirely different formations from the original Island No. Ninety-Four (94) and are located in a different geographic vicinity; have different histories of origin; are different in size and shape than [sic] the original island; and at all times since their formation in the 1930's, have been west of the boundary between the States of Louisiana and Mississippi.

9. No avulsion has occurred in the Lake Providence Reach of the Mississippi River since 1882 which would freeze the boundary between the States of Louisiana and Mississippi, as claimed by plaintiff. Neither the banks of the river nor the thalweg are involved in plaintiff's claim of avulsion.

10. The Lake Providence Port is partly or wholly situated on lands surveyed by U.S. Deputy Surveyors in the period of 1824-1829. A large portion of the sections involved, Sections 1 and 2 of T10N-R13E of the Louisiana Land District North of Red River were eroded away by action of the river and subsequently restored by accretion.

11. The ownership of the two accretionary features or islands adjacent to the west bank of the Mississippi River at Lake Providence, Louisiana, sometimes referred

to as "Stack Island(s)" belongs to the State of Louisiana and/or its residents, having been formed on the bed and banks of that portion of the Mississippi River lying in Louisiana.

12. The plaintiffs in this case, as successors in title to the original owners of Island No. Ninety-Four (94) have no claim of ownership to the two accretionary features or islands adjacent to the west bank of the Mississippi River at Lake Providence, Louisiana, sometimes referred to as "Stack Island(s)".

13. The legal boundary between the States of Louisiana and Mississippi is defined by the live thalweg, except in the vicinity of Island No. Ninety-Four (94) as it existed in 1888, where the legal boundary between the two states is defined by the dead or frozen thalweg immobilized in east channel Stack Island Chute by the avulsive diversion of the main channel by construction works of the Mississippi River Commission.

14. The principles of law applicable to river boundary cases between states mandates that the boundary be determined or defined by the "ordinary course of traffic on the river" or "track of navigation," not by the deepest or geologic thalweg.

15. Recent maps published by the U.S. Geological Survey and other agencies which purport to depict an "indefinite" or "undetermined" boundary at variance with the thalweg boundary - which must be determined by the main navigation channel (as depicted, for example, on the flood control and navigation charts) - possess no

authority for such departure from established principles of river boundary law.

Respectfully submitted,
WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Gary L. Keyser
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PLAINTIFF'S EXHIBIT 64
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JULIA DONELSON HOUSTON, ET AL PLAINTIFFS
CIVIL ACTION
NO. W86-0080(B)

VS.

RUTH M. THOMAS, ET AL DEFENDANTS

CERTIFICATE OF CHANCERY CLERK OF
ISSAQUENA COUNTY, MISSISSIPPI

The undersigned, Mary T. Vandevender, states under oath as follows:

I am the Chancery Clerk of Issaquena County, Mississippi which office I have held continuously since 1960 and hold at the present time. I have in my official custody all of the existing and available real estate assessment rolls through the year 1985 and tax receipts of Issaquena County through the year 1983.

I further certify that I have examined the available real estate assessment rolls of Issaquena County, Mississippi, with respect to all lands known as Island No. 94, also known as Stack Island, being also designated as Section 27, Township 11 North, Range 9 West, Issaquena County, Mississippi, and accretions thereto beginning with the year 1889 down to and including the year 1985, and such assessment rolls show that beginning with the year 1889 and each year thereafter down to and including the year 1985, all of such lands have been assessed to S. B.

Blackwell, also known as Stephen B. Blackwell, George T. Houston, et al, Houston Bros. Inc., George T. Houston and Ruth H. Houston, and George T. Houston, III and Ruth H. Jarvis Baker, and Ruth H. Jarvis Baker.

I further certify that the real estate assessment rolls of Issaquena County, Mississippi are unavailable for the years prior to 1889 and that the said rolls are unavailable for the years not shown on the attached Exhibit "A".

I further certify that during the years mentioned above, no other person or party has been assessed with any of the above described land other than the parties mentioned above.

I further certify that I have examined the available ad valorem tax receipts of Issaquena County, Mississippi, with respect to all lands known as Island No. 94, also known as Stack Island, being also designated as Section 27, Township 11 North, Range 9 West, Issaquena County, Mississippi, and accretions thereto beginning with the year 1916 down to and including the year 1983, and such tax receipts show that beginning with the year 1916 and each year thereafter down to and including the year 1983, all of such lands have been assessed to S. B. Blackwell, also known as Stephen B. Blackwell, George T. Houston, et al, Houston Bros. Inc., George T. Houston and Ruth H. Houston, George T. Houston, III and Ruth H. Jarvis Baker, and Ruth H. Jarvis Baker. It should also be noted that it appears that this property was sold to the State of Mississippi for nonpayment of ad valorem taxes for the years 1927, 1930 and 1932. Also, there are no tax receipts available in my office prior to the year 1916. Further, no

tax receipts could be found in my office for the years not shown on the attached Exhibit "B".

Attached to this Certificate are copies of the available assessment rolls and tax receipts. Some of the tax assessment rolls are not able to be copied. For those rolls Exhibit "A" reflects the information for each tax year, the acreage assessed, the total valuation and the page in the respective assessment roll where the entry may be found with regard to the said property.

/s/ Mary T. Vandevender
MARY T. VANDEVENDER,
CHANCERY CLERK
ISSAQUENA COUNTY,
MISSISSIPPI

STATE OF MISSISSIPPI
COUNTY OF ISSAQUENA

SWORN TO and subscribed before, this 10 day of
May, 1989.

/s/ JoAnn Heigle
Notary Public
My Commission
Expires: Sept. 21, 1991

Page numbers in brackets refer to pages in transcript.
 DIRECT EXAMINATION OF EYREAL "JELLY" HIGGINS

* * *

[p. 56] Q. (By Mr. Bailess) Jelly, could you describe for the Court how you knew what the people in Lake Providence felt about which state this property was in?

A. Well, all of them I talked to and all of them I know, it was considered to be Mississippi.

Q. Did you ever talk to the Louisiana game wardens?

A. Yes, I did.

Q. - Did they ever claim this to be Louisiana?

A. No, they didn't. I asked for some protection to try to keep people off and they said it was out of their jurisdiction.

* * *

[p. 57] Q. Okay. Did any of those three Louisiana game wardens ever exercise any jurisdiction over Stack Island, to your knowledge?

A. Not to my knowledge.

Q. Did you request their help in policing Stack Island?

A. Yes, I did.

* * *

[p. 65] Q. You mentioned a moment ago that the sheriff, Mr. Gilbert, knew that you had control of Stack Island. Did you ever request any help from him?

A. Yes, I did.

Q. Did you ever receive any help from him?

A. No, I didn't.

Q. What kind of help did you request from him?

A. You know, to try to keep people off and everything and he told me he had no jurisdiction over there.

* * *

CROSS-EXAMINATION OF EYREAL "JELLY" HIGGINS

[p. 78] Q. The what? Oh, authorization. And I believe you said that Captain Jack Wyly had posted some of the lands himself.

A. Yeah, I think on that bank it was posted there.

[p. 79] Q. And you recall that Jimmy House also posted the land in front of his property out onto the island, don't you?

A. Jimmy who?

Q. House.

A. No, I don't recollect that.

Q. You don't remember seeing those posters?

A. Now, he could have but I didn't go down there so I wouldn't know.

Q. Did you know that the Louisiana legislature had transferred ownership of the island in the river to the Fifth Louisiana Levee District in 1908?

A. No, I didn't.

Q. Nobody ever told you that?

A. Nobody ever told me that.

Q. You never knew about the court case about that?

A. No.

Q. Now, I believe you said that the Louisiana game wardens would honor a Mississippi deer tag?

A. Yes.

Q. So, if you brought a deer off that island and you had a Louisiana license and a Mississippi deer tag you would be okay?

A. Yes.

[p. 80] Q. So actually they were watching hunting on the island, weren't they?

A. Pardon?

Q. The Louisiana game wardens were paying attention to hunting on the island, weren't they?

A. Yes, they just wanted to make sure it came out of Mississippi and not in Louisiana.

Q. Or that it had a Mississippi tag?

A. Yeah.

Q. Okay. You could also hunt deer and use a Louisiana tag out there, couldn't you, during the Louisiana deer season?

A. Yeah, if the Louisiana - if the Mississippi season was open. But you had to have a Mississippi tag, deer tag, over here. You couldn't just go over there and hunt with a Louisiana license because you had to have the Mississippi tag.

* * *

[p. 81] THE COURT: What about on Stack Island?

THE WITNESS: But not - Mississippi season would have to be open to hunt on Stack Island with a Louisiana license.

THE COURT: Could you ever hunt on Stack Island without the necessity of a Mississippi deer tag?

THE WITNESS: No, sir. Because there's a bunch of them got picked up over there and they took them to Mayersville, Mississippi.

* * *

DIRECT EXAMINATION OF CHARLES P. SHELTON

[p. 96] Q. Did you have occasion during that time to talk with other people in the Lake Providence area to [p. 97] determine whether or not they had formed any opinion about whether this was - whether Stack Island was Mississippi or Louisiana?

A. No. * * * In other words, everybody considered it as Mississippi as far as I knew at that time, you know.

Q. You mentioned that you went to Mississippi looking for help. Who did you go see?

A. We went to Mayersville. The sheriff of East Carroll Parish went with us.

Q. Who was the sheriff at that time?

A. Sam House. Me, James Kelly, and Sam House, we all - he drove us over in his car to Mayersville to try to get help over that way because he said he [p. 98] had no authority on that island but he was nice enough to go with us to see if we could get help on the Mississippi side.

* * *

CROSS-EXAMINATION OF CHARLES P. SHELTON

[p. 104] Q. You did say that you had a build a fence around the property that Sheriff Sam House claimed?

A. Yes, sir.

Q. So, he was on the Louisiana side but claimed out through the chute?

A. Yes, sir.

Q. Onto the island?

A. Onto the island.

[p. 105] Q. So, you had to make a fence around his claim?

A. Yes, sir.

* * *

DIRECT EXAMINATION OF JAMES B. KELLY

[p. 136] Q. Did you ever request the Louisiana game wardens, Game and Fish Commission, or whatever the proper name for it is in Louisiana, did you ever request that any game warden help you patrol the island or help you prosecute people and keep down trouble?

A. Yes, sir. I asked them several years but they told me, the captain did, that he couldn't allow his men to come on Stack Island because as far as he knows he's got orders from Baton Rouge that that was in Mississippi, to keep all the wardens away from Stack Island.

* * *

CROSS-EXAMINATION OF JAMES B. KELLY

[p. 145] Q. But the Wildlife people from both states really didn't seem to know the extent of their jurisdiction over the island; isn't that true?

A. Louisiana didn't, but Mississippi did.

* * *

DIRECT EXAMINATION OF BILL MARSHALL

[Witness was agent, Mississippi Bureau of Narcotics]

[p. 226] Q. Are you familiar or had any dealings with Stack Island, that formation of land called Stack Island?

A. Yes, I am.

Q. And how did you become familiar with that, Bill?

A. We found a large patch of marijuana growing there in 1981 and subsequently arrested some people there.

Q. Okay. How did you become familiar with Stack Island?

A. Our office had received a call from the Louisiana State police that while they were doing aerial surveillance along the Mississippi River that they found a patch of marijuana growing and through their research they found out that this island was, in fact, in Mississippi and they had called and requested -

* * *

CROSS-EXAMINATION OF BILL MARSHALL

[p. 230] Q. As I understand your testimony, the Mississippi people had found the marijuana field?

A. Originally the Louisiana State Police had found it.

Q. Okay. And that was Trooper John Payne who made the call to whom?

A. Auger. His last name is Auger. I don't remember his first name. I just know he was the supervising sergeant. I think they were both out of Monroe, maybe.

Q. And, so, the arrest was actually a joint operation at the time they actually took the subjects into custody?

A. Yes, sir. They had taken them into custody. At the time they were arrested they were just - we were in the process of obtaining a search warrant and they had gone to the area of Stack Island to secure the area until the search warrant was obtained. And while - when they got there they found these people there and they saw them, so they had to arrest them at that time or detain them or whatever they did.

* * *

DIRECT EXAMINATION OF RALPH POLK

[p. 242] Q. In the period that you were on the island or hunting on the island, did the Louisiana game wardens ever come on Stack Island?

A. No.

* * *

[p. 243] Q. Ralph, during that time that you lived in Lake Providence, do you know whether there was a general reputation in the Lake Providence community concerning whether or not Stack Island was Mississippi or Louisiana?

A. Everybody there believed it was Mississippi. The sheriff's department, everybody, the game warden, even the landowners along there thought it was Mississippi. We thought it was Mississippi. We didn't know.

* * *

CROSS-EXAMINATION OF RALPH POLK

[p. 252] Q. I can understand that. I understand that. And I believe you said that you didn't know whether Stack Island was in Louisiana or Mississippi. You thought it might be in Mississippi, but you didn't know.

A. I was born and raised there. [Polk's age is 42] And the whole time I lived there, everybody said it was Mississippi and I grew up thinking it was in Mississippi.

Q. But you knew there was uncertainty about that, didn't you?

A. No, there wasn't any doubt. I mean, that's - I thought Stack Island was Mississippi, just like East Carroll Parish was Louisiana.

Q. Did you ever make any inquiry into that?

A. No.

Q. Never talked to anybody, did you?

[p. 253] A. Well, I believe we asked the sheriff one time - we had some goats over there and we asked the sheriff over there - dogs was killing the goats over there, and I think we asked for some help from the sheriff about the dogs. And I don't believe they could - if I remember right, I don't believe they could do anything.

Q. How could you get onto the island at that time?

A. On horses.

Q. Did the sheriff have any horses?

A. No, I don't guess. I don't know.

* * *

[p. 255] A. I don't believe we even went to the sheriff's office. I think we talked to a [East Carroll Parish] deputy sheriff which was Claire Warner at the time. [around 1959] Mr. Claire Warner, I believe to the best of my recollection he said that there wasn't anything he could do about it because it was over on the island and that was Mississippi.

* * *

VOIR DIRE EXAMINATION OF AUSTIN SMITH

[p. 270] Q. Is that your most recent case before the Supreme Court?

A. No, sir.

[p. 271] Q. Is there any reason that you didn't attach the most recent cases that you've had with the Supreme Court?

THE COURT: Mr. Keyser, you are wasting my time.

* * *

[p. 273] Q. (By Mr. Keyser) Mr. Smith, do you have a agree [sic] in potamology?

A. I have a working degree in potamology.

Q. Do you have a degree from any university?

A. No. I consider myself one of the foremost potamologists in the country.

Q. Do you know anyone else that so considers you?

A. Well, if you read that learned judge's description, you will find out there are other people who think the same thing.

Q. Is it true that you've never written an article on potamology?

A. Well, I've written articles around it.

Q. But not actually on the subject itself?

A. No.

* * *

DIRECT EXAMINATION OF AUSTIN SMITH

[p. 284] Q. Mr. Smith, from your study of Stack Island, are you able to determine which state Stack Island is located?

A. Well, I found it to be located in Mississippi by the matter of the 1981 land survey.

Q. You said 1981.

A. 1881 land survey.

* * *

[p. 285] But I'd like for you to refer to P-1 and ask you to say whether or not Stack Island is shown on P-1. And what is P-1?

A. That is the township plat of Township 11, Range 9 West of the Choctaw District in Mississippi.

Q. What county in Mississippi?

A. That would be Issaquena County.

Q. Okay. And that map was prepared when, Mr. Smith?

A. It was in the 18 - I believe it was 1820. I'm not sure.

THE COURT: 18 what?

THE WITNESS: 1826 is the date, I believe, on here, sir.

Q. (By Mr. Bailess) Okay. And on that map, Mr. Smith, is Stack Island shown?

A. It's sketched in there, sir, on that map.

* * *

[p. 286] Q. (By Mr. Bailess) Mr. Smith, with Exhibit P-2, how do Exhibit P-1 and P-2 fit together? East and west?

A. They are on the opposite side of the river.

Q. Okay.

A. One Mississippi and one Louisiana.

Q. Is Stack Island shown on Exhibit P-2?

A. No, sir.

* * *

[p. 291] Q. And the second page of that exhibit (exhibit P-3 prepared in 1867) is a, appears to be a survey. Would you describe what it shows.

A. This survey shows the location of the locus of Stack Island in 1867. And it was consolidated by a sand-bar on the Mississippi shore at the time of this '78 [sic] survey.

* * *

[p. 293] Q. (By Mr. Bailless) Mr. Smith, the next exhibit is P-4. What is it?

A. This is a 1874 reconnaissance survey map.

THE COURT: What kind of survey map?

THE WITNESS: Reconnaissance survey map of the Mississippi River.

* * *

Q. Is Stack Island shown on this exhibit?

A. Yes, sir.

Q. And how is it shown?

A. It's shown as an island.

* * *

[p. 294] (Testimony refers to Exhibit P-4)

Q. Also there is words written in red, looks like "Mississippi-Louisiana boundary channel"?

A. Yes, sir.

Q. And a red dotted line on this exhibit. What is that?

A. I followed Suter's dotted line indicating the thalweg of the river. Put a red mark on it.

Q. So, there was a thalweg line placed on this map by Mr. Suter in 1874?

A. Yes.

* * *

(Testimony refers to Exhibit P-4)

Q. At the time of this survey in 1874, Mr. Smith, where was the boundary thalweg of the Mississippi River at Stack Island?

A. It was on the left side.

Q. Which would place Stack Island in which [p. 295] state, Mississippi or Louisiana?

A. Mississippi.

* * *

(Testimony refers to Exhibit P-5)

Q. All right. Would you indicate to the Court the - where the thalweg was, the boundary thalweg between Mississippi and Louisiana at that time in 1879.

[p. 296] A. I placed the boundary thalweg as I thought it would be on here in red color. I marked it "Thalweg Navigation Channel Carries the Interstate Boundary."

Q. And is that west or east of Stack Island or Island No. 94?

A. That's west of Stack Island. I've got Mississippi and Louisiana marked in red on that line.

* * *

[p. 299] Q. (By Mr. Bailess) Mr. Smith, are these [exhibits P-1 through P-5] some of the exhibits that you reviewed in formulating your opinion concerning the bounds of Stack Island?

A. Yes, sir.

* * *

[p. 300] Q. In Exhibit P-6 can you tell how the deputy surveyor tied Island No. 94 in to Mississippi through his survey?

A. Yes, sir. He tied it to Township 11, Range 9 North by the line running between Lots 5 and 6 of Section 3. And he tied the west end of that line to Island 94 or Stack Island.

Q. Is Island 94 and Stack Island one and the same?

A. Yes, sir.

* * *

[p. 301] Q. (By Mr. Bailess) Mr. Smith, do those surveyor's notes mention the size of any trees [Reference is to Exhibit P-6] on Island No. 94, Stack Island?

A. Yes, sir, they do. When he was meandering the island, he saw those trees. He marked the trees at certain corners. He notes that they are of certain size.

Q. I want to refer you to page 3 of those notes, Mr. Smith, down towards the bottom. Does it mention the size of the tree in that?

A. Yes, sir. It mentions the 40-inch diameter [p. 302] tree.

Q. A tree that is 40 inches in diameter?

A. Yes, sir.

Q. Is that on Stack Island or Island No. 94?

A. Yes, sir.

Q. If you will turn the page up at the top, I believe there's another tree mentioned on the first line of that description. Does it mention a 26-inch diameter hackberry tree?

A. Yes, sir.

Q. I think another tree is mentioned in the next paragraph as being some 30 inches in diameter; is that correct?

A. Yes, sir.

* * *

[p. 303] Q. (By Mr. Bailess) Mr. Smith, I'm going to refer you to what's been marked P-7. Is that a surveyor plat that was made by the deputy surveyor whose field notes we just reviewed?

A. Yes, sir. It's a plat of Island 94, Township 11, Range 9 West. Dated October 4, 1881.

Q. On that plat, are you able to determine which state that property is located, Island No. 94 or Stack Island?

A. It's in Mississippi.

Q. Tell me how you know that, Mr. Smith.

A. Well, it was titled Mississippi land that they surveyed in Mississippi. There was an island in this.

Q. Okay. Can you tell by looking at Exhibit P-7 where the boundary thalweg channel is located?

A. It's on the left side of Stack Island.

Q. And how can you tell that by looking at that exhibit?

[p. 304] A. Well, it says "good deep channel, no bottom." Now, that mark is at the head.

THE COURT: It's a mark what?

THE WITNESS: It's marked "good deep channel, no bottom."

* * *

Q. Mr. Smith, are you familiar with what the term "no bottom" means, or what it meant in 1881?

A. Yes, sir.

Q. What does it mean?

A. It means that it was over 24 feet deep at the time the man made the survey.

* * *

Q. There is also some words printed on this plat. I'm trying to - it looks like "heavy caving of bank" written right up under where it said "good deep [p. 305] channel."

A. Yes, sir.

Q. What does that tell you, Mr. Smith?

A. There's a current there. There's a strong current there.

Q. Mr. Smith, over on the east side of Island No. 94 as shown on this Exhibit P-7, I see the words "east chute of Mississippi River."

A. Yes, sir.

Q. What does that mean to you?

A. Well, it means that's the chute of Stack Island.

Q. A lesser channel of the Mississippi River?

A. Much lesser.

Q. Okay. I see at the head of the island, still in the chute, what's been labeled "east chute of Mississippi River," the words "depth 12 foot." What does that tell you, Mr. Smith, about that east chute channel?

A. Well, it wasn't too much water at the head at that time.

Q. I see down on the south end of the survey plat the word "shoals," s-h-o-a-l-s? What does that mean, Mr. Smith?

A. That means shallow water.

* * *

[p. 308] Q. (Testimony refers to Exhibit P-8) What does Marshall's shoreline survey of October and November, 1881, show with regard to the boundary thalweg of the Mississippi River, Mr. Smith?

A. Using the Government lights which were established at that time on the right descending bank and the left descending bank, the thalweg would be on the west side of Stack Island.

[p. 314] Q. Mr. Smith, have you examined the soundings on this 1882 hydrographic map in the bed of the river to determine where the boundary thalweg is located on this Exhibit P-13?

A. Yes, sir.

Q. And how have you so indicated that on this map?

[p. 315] A. I have indicated it by a dashed, dotted red line.

Q. And is it west or east of Stack Island?

A. It's west of Stack Island. I've labeled that "Mississippi-Louisiana."

[p. 322] Q. Mr. Smith, with regard to your study that you made at my request, are you able to determine whether or not Stack Island has ever disappeared?

A. I found that it was land in place in 1881 and remained land in place until today.

[p. 324] Q. Describe briefly what happened to it from that time through the next, let's say through 1894.

A. Well, the lower end of Stack Island was avulsed across during the flood of 1883, '84.

Q. Is that shown on Exhibit P-14?

A. Yes, sir. That's the 19 - the 1884 hydrographic survey that has spot soundings. But that shows Stack

Island has been avulsed across by the river. And the remnant of the Stack Island is shown downstream at a considerable distance from it.

[p. 330] Q. Mr. Smith, by looking at this exhibit, which I believe is P-17, and noting the lights as you have, where would you say at that time the navigation channel was?

A. It was on the west side of Stack Island.

Q. Where would you say the thalweg was?

A. On the west side of Stack Island. I'm talking about the boundary thalweg.

[p. 334] Q. (By Mr. Bailess) Mr. Smith, in or about the year 1913 when the Stack Island east chute channel was adopted for navigation, what happened to Stack Island?

A. Well, it was in a position to -

Q. You need to speak into the microphone, please, sir.

A. Well, the flow was pretty well divided at that particular time on the east side and on the west side. So, conditions were favorable for the island to go downstream.

Q. Mr. Smith, in or about this year when the east chute channel was adopted for navigation, did the navigation channel creep over Stack Island?

A. No, sir. The major flood of 1912 and 1913 apparently enlarged the chute channel and this was adopted by navigation. That adoption is avulsive in nature and it leaves the Mississippi-Louisiana thalweg boundary on the west channel.

Q. Did the navigation channel which heretofore you testified has been located west of Stack Island, did it jump over Stack Island?

* * *

[p. 338] Q. Okay. Now, my question is did the boundary thalweg channel that was located on the west side of Stack Island jump over Stack Island, did it run around Stack Island, or just what did it do?

A. Well, I'm not a "jump over" witness. The thalweg, boundary thalweg stayed on the west side of Stack Island. The floods of 1912 and 1913 enlarged the chute channel to the east of Stack Island. And it was of an avulsive nature, that enlargement was. And it was adopted by navigation. And the boundary thalweg remained on the west side of Stack Island under those conditions. This has happened in other places.

Q. Repeat that, Mr. Smith, please.

A. Such action of enlarging the chute channel, [p. 339] of an island is called avulsing, leaving the boundary channel on the other side of the island unaffected.

Q. Mr. Smith, since 1913 in your study of this property, this island, has Stack Island ever disappeared or eroded away since that time?

A. No, sir, it has not. You had me make a study of the location of Stack Island. And that study clearly showed that Stack Island was land in place in 1881 and remained in place throughout the entire period and is still there today.

* * *

[p. 340] Q. What happened to the abandoned navigation channel west of Stack Island after 1913?

A. Well, it gradually attenuated and lessened and in 1955 or thereabouts, ceased to flow.

Q. What is the significance of the channel ceasing to flow in or about 1955, Mr. Smith?

A. Then that would fix the locus of the thalweg of the boundary.

Q. The boundary between what?

A. Between Mississippi, and Arkansas - I mean and Louisiana.

* * *

[p. 401] MR. BAILESS: Your Honor, at this time we would offer Exhibit P-32 and P-32-D.

THE COURT: Are you going to ask him what those numbers represent?

MR. BAILESS: I will, Your Honor. I planned to do it in a different way.

Q. (By Mr. Bailess) But what do those numbers represent, Mr. Smith?

A. Those are the geographic locations of the boundary and they are tied to the north latitude and the west longitude lines on the map.

Q. Mr. Smith, what boundary does that represent?

A. It represents the boundary between Louisiana and Mississippi.

THE COURT: P-32-D and P-32 will be received into evidence.

(Exhibits P-32-D and P-32 offered and received into evidence.)

Q. (By Mr. Bailess) Mr. Smith, I'm going to hand you a portion of the complaint filed in this case which is numbered 52. The Paragraph 52 in that complaint is found on page 12 and 13 of the complaint [p. 402] and is a document that is attached to the complaint as Exhibit A. Is Exhibit A as is shown here a copy of what has been admitted into evidence as 32-D, just reduced in size?

A. Yes, sir.

Q. And does the description contained in Paragraph 52 of the complaint conform and accurately describe the boundary between Mississippi and Louisiana?

A. Yes, sir.

CROSS-EXAMINATION OF AUSTIN SMITH

[p. 409] Q. (By Mr. Keyser) Mr. Smith, this sketch that you've drawn in orange pencil on P-2 is your [p. 410]

representation of Stack Island as of this date against the west bank of the river, is it not?

A. Well, it's the approximate north and south limits. It doesn't include the erosion into the original sections along the west bank.

Q. So, as I understand your testimony, the island as it's presently located includes some of the original sections in this original township plat?

A. I'm sure that it was erosion into the - because the levee had to be set back numerous times. So, it was erosion.

Q. Thank you. Mr. Smith, did you make any effort to locate on P-2 or any other exhibit the island by latitude and longitude or just the boundaries you refer to in your testimony?

A. I don't understand your question.

Q. If I understand your testimony, you have located the boundary by latitude and longitude on the various exhibits that Mr. Bailess showed you; is that correct? Or by geographicals, as the judge said?

A. I located that on the 1975 hydrographic survey.

Q. By latitude and longitude?

A. Yes, sir.

Q. Did you make any effort to do the same thing [p. 411] with the island itself?

A. No, sir.

Q. Did you do that with the original Stack Island that was patented out in 1888?

A. No, sir, I didn't. The map -

Q. Now, as I -

MR. BAILESS: Your Honor, the witness should be allowed to respond. He was trying to speak.

THE COURT: Let the witness finish his answer, if you would, please.

A. The 1881 land survey shows the limits of the island as meandering.

Q. (By Mr. Keyser) Let me find it, Mr. Smith. I show you Plaintiffs' Exhibit 1 and ask if that's what you have reference to.

A. No, sir, I have reference to the land survey of 1881.

Q. I see. Locating Stack Island?

A. Locating the Stack Island with reference to Township 11, Range 9 West in Issaquena County.

Q. And I believe that survey located it just as you said on this township plat in Township 11, Range 9 West in the Choctaw District, does it not?

A. Yes, sir. It was located opposite Section 3 of Township 11, Range 9 West.

[p. 412] Q. Okay. As I understand what you're saying, it is depicted on P-1 and it is opposite these sections 1, 2, and 3 in the Choctaw District, is it not?

A. Yes.

Q. Okay. Now, in P-2, being a Red River District, or a district north of the Red River, it's now located, according to your sketch, in Township 21, Range 13 East of another land district, is it not?

A. It isn't in that land district. It's in - it remains in the Mississippi district.

Q. You've drawn it in the Louisiana district, though.

* * *

[p. 413] Q. I believe you said with respect to P-18 which I placed on the board there in front of you, that the floods of 1912 and 1913 worked some major changes on the downstream course of navigation.

A. I said they had enlarged the chute channel during the major floods of 1912 and '13 and that [p. 414] navigation adopted the chute channel at the time of the 1913 hydrographic survey.

Q. Would you agree that the ordinary course of track of navigation as of 1912, 1913 was actually in the east channel, chute channel prior to the floods?

A. I have no record, nothing to substantiate the exact date that I know that in 1908 it was on, the navigation was on the west side of Stack Island.

* * *

Q. Mr. Smith, I've given you Louisiana Exhibit 16, a U. S. geological survey of the river in 1909 and I've given the Judge a copy of 16-A, being essentially the same map. Does that map depict the Louisiana-Mississippi boundary from the east chute channel?

[p. 415] A. Well, I don't know. The map - this says the State of Louisiana. It doesn't say anything about the - it just barely advises that the U. S. Geological Survey had George Smith direct it. But this map must have been made by the State of Louisiana. And -

Q. Mr. Smith, do you refute that that map was made by the Geological Survey?

A. I don't think it was made by the Geological Survey.

Q. I showed you that map some weeks ago and you've had some weeks to examine it, have you not?

A. Well, it states over here in the notes that the shoreline in the river are surveyed by state engineers, topography between levee and river surveyed by Mississippi River Commission. I think this is something the State of Louisiana might have cooked up.

* * *

Q. Well, Mr. Smith, do you see anything inaccurate about that map that you'd care to tell us about in court today? Anything about the area, measurement, size, location, anything that's at issue [p. 416] here that you would disagree with?

A. Well, I would disagree that there's a line on here which purports to be the Louisiana-Mississippi boundary. That's entirely erroneous.

* * *

Q. I see. Now, I believe you'll also agree with me that the map shows the radiating sections from the Louisiana side towards Stack Island?

A. Yes, sir, I see the sections.

[p. 417] Q. And even at that time those section lines almost touch the island, don't they?

A. Well, I don't know what the - they left the radiating sections and never attempted to show what happened to them.

* * *

Q. When the Mississippi River Commission was formed in 1879, which two projects along the Mississippi River did it select as its first projects?

A. Well, they selected the Lake Providence reach as one. And the other was the Plum Point reach, I believe.

Q. Correct. Those were the first two major projects. Lake Providence, I think you will agree the main problem was that there were unstable bank [p. 418] conditions and as of 1879, 1880, 1881, and 1882, the main channel of the river was actually flowing east of the island. Don't you agree with that?

A. No, sir.

Q. Do you agree that the Mississippi River Commission shows as its Lake Providence project the establishment of a system of dikes north of Stack Island?

A. I remember seeing the map that showed the locus of the dikes.

Q. Do you remember that at that time the main steamboat channel went between Stack Island and Mississippi on the east of the island?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. Do you remember that bank caving conditions along the Mississippi shore caused the Mississippi River Commission to use as its first project in this reach of the river the dike construction that I asked you about earlier?

A. I don't remember that.

Q. Do you remember that the dike construction was intended to move the river from the east chute channel to the west channel in 1880, 1879?

[p. 419] A. Well, they built a dike system all along the east side there above Stack Island and that closed off the flow in the chute channel and by 1894 there was practically no chute channel there that had been filled up. The 1894 map shows very little flow in the chute channel and all of the buoys on the west side of Stack Island flow.

Q. So, you do recall that the dike system that was established was to divert the river from the east chute channel to the west channel; is that right?

A. It wasn't to divert the flow from the west - the east chute channel. It was to put all the flow along an alignment they had selected.

Q. Well, that selection was the west channel, was it not?

A. Well, it was west of Stack Island.

Q. So, prior to the establishment of the dike system, the east channel chute was the main navigation channel, wasn't it?

A. Which was?

Q. The east.

A. No, sir.

* * *

[p. 461] Q. Mr. Smith, during your testimony you said that Island No. 94 and Stack Island were one and the same; is that correct?

A. Yes, sir.

Q. Where is Island No. 94 today?

A. Well, it's over on the right bank of the Mississippi River along the front of Lake Providence.

* * *

[p. 462] Q. Mr. Smith, I show you a feature outlined in black on this 1988 Geological Survey map. And I tell you that is the precise geographic location of Stack Island in 1881. Taking that for granted, is that -

A. I didn't check it.

[p. 463] Q. Just if you'll assume that just for the purpose of this next question. If you will assume that this is the position of Stack Island in 1881, is it in the same geographic position as the Stack Island you contend is the Stack Island on the west bank?

A. No, sir.

Q. Thank you.

* * *

DIRECT EXAMINATION OF JIMMY R. HOUSE

[p. 537] Q. (By Mr. Keyser) Is the House property above or below the Lake Providence Port Commission facility?

A. It's above, north.

Q. Has the accretion that's attached to your family's property sometimes been referred to as Stack Island?

A. It's been referred to as Stack Island Hunting Club. That's where the name Stack Island came from.

* * *

[p. 538] Q. Thank you. How have you known the accretion in front of your family property to be called?

[p. 539] A. Well, years ago we called it Stack Island Hunting Club and then about ten years ago we formed our own hunting club and we called it Triage Hunting Club because that's what we called the property across there.

Q. I believe you said it had not been known simply as Stack Island.

A. I've always called it Stack Island Hunting Club because I always understood that another island north-east of this property to be called Stack Island.

* * *

[p. 540] Q. Okay. If you'll take the stand, please. You have drawn parallel lines extending from west to east describing the tract of land which is rectangular in shape and extends to the water's edge; is that correct?

A. That's correct.

Q. Now, have you used this land as the family land during your lifetime?

A. I have.

Q. Has anyone ever said that it was their land or made a claim against your family?

A. Not until this time.

* * *

[p. 548] THE COURT: Mr. House, have you testified that you've hunted that whole area or just the part that you mark is claimed owned by the House family?

THE WITNESS: Well, I have hunted probably all of it at one time or another with other people that had other claims to the property. We know everybody over there that owned the property north and south of there so we have hunted together. But mostly my hunting has been done on that property right there and the Wyly estate property because I have some friends that are in with the Wyly family and we've hunted back and forth on their property and mine. And [p. 549] 99 percent of the hunting I have done has been on those two pieces of property.

* * *

DIRECT EXAMINATION OF ERNEST S. EASTERLY

[p. 633] Q. (By Mr. Keyser) In the course of your study of this reach of the river, did you also consider Louisiana Exhibit 18-A.

A. Yes, sir, I did. That is the 1883 report of [p. 634] the Mississippi River Commission.

Q. Could you tell the Court what significance that was in your study.

A. Well, of course, by this time the Stack Island, Island 94, has become located near the Mississippi bank and according to the report and information, it's fairly clear that a series of dikes were going to be constructed in order to deflect the main channel of the river to the right of Stack Island. Of course, that's to the right descending because by this time the main channel of the river had begun to be diverted through the Stack Island chute and there is language in the report to that effect and the map attached to the report shows the old steamboat channel. And, of course, that was a line that was becoming increasingly evolved by traffic. If you look in the report on page 434 - and may I quote?

Q. Yes.

A. Where it says "fourth" and I suppose this is one, two, three, four - the fifth paragraph. It says "Fourth - The closing of the main channel of the river, which passed between the foot of Baleshed Bar and the head of Stack Island, and bringing it back to the right of Stack Island by a system of deflecting dikes located on the Louisiana side at Elton Bar . . . "

[p. 634] It later goes on on page 425 to talk about - and again this is under "Stack Island." "In order to force the main channel of the river, which flowed down the Stack Island chute, on the outside and along the face of the island between it and Elton Bar, a main dike consisting of

two rows of piles was driven . . . " And, of course, this would have the effect of throwing that channel back over to the right of Stack Island. And that was the purpose of these constructions.

* * *

[p. 637] Q. Okay. When was the course or track of navigation in the east chute channel?

A. It would have been in 1881 and in times prior.

* * *

[p. 653] Q. Dr. Easterly, I show you Louisiana Exhibits 77, 78, 79 - pardon me - 76, 77, 78, and 79, and ask if you can identify these.

A. Yes. These are exhibits from the records of the State Mineral Board for the State of Louisiana. State's Exhibit No. 76 is the August 13, 1980, Lease Sale. Actually it's an advertisement for the lease sale, certain tracts, a Tract No. 16885, which, of course, embraces much of the subject area and, of course, this lease sale that was culminated in a lease, I believe the lease is Lease No. 77.

Q. Exhibit No. 77?

A. Yes, it is.

Q. And what is the state lease number?

A. The state lease number is 8884 for the contract here. The tract is listed as 16885. Advertisement: But both of the leases comprise lands now or formerly constituting beds and bottoms of all water bodies within a given section - within a given area, rather. And this, of course, area covers part of the subject area of dispute.

* * *

[p. 654] Q. Do you have LA-78 there?

A. 78 is another advertisement for lease sale and this resulted in the mineral lease 8885. This was also for lands now or formerly constituting the beds and bottoms of all water bodies within a given area and covering much of the same area. Actually this lease was a little below the previous lease with the same general vicinity. This particular lease was also granted August, 1980.

* * *

[p. 655] A. 16886.

Q. Again, another oil, gas and mineral lease?

A. Another oil, gas, and mineral lease.

Q. By the Louisiana State Mineral Board?

A. That is correct.

* * *

CROSS-EXAMINATION OF ERNEST S. EASTERLY

[p. 655] Q. (By Mr. Bailess) Those leases only convey whatever interest the State of Louisiana has in the captioned lands; isn't that correct?

A. That is correct. Without warranty and recourse.

Q. And I think it also provides that if - both of those leases provide that if payments are made to the state, State of Louisiana, and it's later determined that it wasn't Louisiana's land to lease that Louisiana doesn't have to pay it back though; is that what that lease says?

[p. 656] A. That's standard policy for all mineral leases for land owned by the State of Louisiana.

Q. The block of description in that land obviously goes into the state of Mississippi, does it not?

A. The description covers a broad tract of the river that does include part of Mississippi.

Q. Far on the east bank of the Mississippi?

A. According to the plat it's clearly identified as such, yes, sir.

* * *

DIRECT EXAMINATION OF HATLEY HARRISON

[p. 717] Q. (By Mr. Keyser) Mr. Harrison, from reading [p. 718] all of the Mississippi River Commission reports regarding the dike construction at Stack Island that we've just discussed in Louisiana 18-A, is there any doubt in your mind that the main channel of the river was in the east chute channel east of Stack Island prior to the commencement of the dike project?

A. No, there's no doubt in my mind that the main channel was in Stack Island chute which separated Stack Island from the Mississippi shore. There's no doubt in my mind at all.

Q. And the dike project caused the channel to be shifted west?

A. That's right.

Q. And was that a sudden change?

A. Sir?

Q. Was it a sudden change?

A. The change was sudden. Once that last piling was driven into the dike across there, it was no more navigation at the thalweg – or the navigation channel had been shifted suddenly and perceptibly to the other side.

Q. Thank you.

* * *

[p. 732] A. Every document that I have analyzed in this case subsequent to 1909 has always shown the navigation line which I considered a boundary between the two states as being east of Stack Island and has always been there. There is an island south of Stack Island which is quite large as appears to be a bit of erosion at the peninsula at the southern end of Stack Island up against the Louisiana shore. I see no erosion that I know, no accretion below that point.

* * *

[p. 827] MR. KEYSER: Your Honor, in lieu of calling Mrs. Theresa Deano on land title and abstract and introducing this whole box of documents back here, our stipulation would be that we would use a Tobin map which shows the Louisiana side of the river at Lake Providence and below. And the stipulation would be that riparian sections as depicted on that Tobin have at all times been owned by Louisiana residents who have paid taxes on those sections of land as they have eroded and accreted and those sections are located in Township 21 North, Range 13 East just below the town of Lake Providence and in Township 20 North, Range 13 East just

below that. And that the Houstons have [p. 828] never been owners of record of any of those sections nor have they paid taxes on any of the land in those sections.

And with that stipulation, Your Honor, and as a part of it we offer –

MR. BAILESS: Your Honor –

MR. KEYSER: – the Tobin map marked as LA-37 in lieu of Louisiana Exhibits 38 through 50 and we would also offer LA-51 which has already been offered by the Plaintiffs and we would like to offer it simply by attaching our LA-51 label to theirs so as not to add more documents to the record.

MR. BAILESS: I'm confused, Your Honor.

THE COURT: Let's take the stipulation first. Let's do it one at a time.

Mr. Keyser, it's my understanding that – what is the exhibit number to be given Tobin?

MR. KEYSER: 37

THE COURT: It's my understanding that the stipulation is that the Tobin map LA-73 will be received into evidence, that that map depicts the ownership lines and section lines that basically run out into the contested river area. That it is stipulated that those areas or that record title to those areas has always been held by Louisiana [p. 829] residents who have paid Louisiana taxes on those areas and that those areas have not been owned either by – have not been owned by record title in the Houston Plaintiffs nor have the Houston Plaintiffs ever paid any Louisiana taxes on those lands.

Now, I assume that it is understood from that stipulation that that stipulation would not be meant to indicate in any way that any erosion of those lands and islands growing off of the eroded bank is intended to have the legal effect of binding the Plaintiffs that way. I assume that this proof is limited, just as the stipulation is limited and the stipulation is limited to showing that Louisiana residents owned contiguous lands to the Louisiana bank and that we still have ownership in contest, these accretions that are at contest in the lawsuit.

MR. KEYSER: Yes, sir.

THE COURT: Can you accept that stipulation?

MR. BAILESS: Yes, Your Honor. We need to clear it up some. First of all, this LA-37 we have not seen before they put it up on the board the other day. And I'm not going to make the objection that they never tendered as the exhibit. And I don't have a problem with the exhibit, and will stipulate that this Tobin which I think we need to get the date off [p. 830] of, is in the late Forties and earlier. I don't know. Just whatever it is. If you'll go get it, Gary, we'll get to that in a minute. But it shows a water line at that time but it also shows a boundary line which we don't agree with on all respects and it also shows, as Louisiana has contended throughout, radiating sections from Louisiana which we don't feel have any effect on what land formations were formed east of the boundary thalweg and in that same place.

THE COURT: Can you reach a stipulation? I'm not going to spend another half hour here listening to the lawyers trying to make a stipulation. Either make a stipulation or call the witness. I'm beginning to -

MR. KEYSER: Judge, as Mr. Bailess stated, the Tobin map is of whatever date it is and it's not intended to suggest that we would lie or try and breach those boundary lines.

THE COURT: Rather than discuss all this with me, make your stipulation if you can make one. If you can't, call the witness. If you need to call the witness, call the witness. Let's get this thing closed up.

(Off the record.)

MR. BAILESS: It would be limited to the [p. 831] mainland of Louisiana as shown on this map, Your Honor, and I think for the record's sake we might draw a red line down the mainland shown on this map. Is that okay with you, Gary? Just the line?

MR. KEYSER: Well -

MR. BAILESS: Is that the water's edge? No, that's the meander line of 1823.

MR. KEYSER: That's agreeable, Judge. It's meant just as a general proposition as you stated it yourself and that really encompasses the stipulation I intended.

MR. BAILESS: Your Honor, just for the record, I'm going to draw a red line along the water's edge just so there won't be any question about what -

MR. KEYSER: That appears to be a meander line or some water line as of the time the Tobin was made, Judge.

THE COURT: Is the stipulation satisfactory with the Plaintiffs now, Mr. Bailess?

MR. BAILESS: Yes, Your Honor.

THE COURT: All right. Is the stipulation satisfactory with the State of Louisiana and the Louisiana Port Commission?

MR. KEYSER: Yes, sir.

* * *

DIRECT EXAMINATION OF MRS. VAIL DELONY

[p. 896] Q. (By Mr. Keyser) You are the mother of Betty Delony Reed?

A. Yes.

Q. And the wife of the late Vail Delony?

A. That's right.

Q. You're familiar with the Delony property that -

A. Yes. I've been on it many times.

Q. The property in the vicinity of the river?

A. Yes, I've hunted out there. I hunted with my husband out there on Stack Island.

* * *

[p. 898] What year did your husband die, Mrs. Delony?

A. He's been dead about 20 years. I have to look at the record. I don't remember exactly. He's been dead around 20 years.

Q. What business was he engaged in at the time of his death?

A. Sand mining.

Q. Did he have any other business?

A. Have what?

Q. Did he have any other business?

A. He was in the legislature, if you call that a business, and he was also Speaker of the House at the time of his death.

Q. Speaker of the Louisiana House of [p. 899] Representatives?

A. That's right.

Q. And he conducted sand and gravel operations in this area?

A. Yes.

Q. For about how long?

A. How long did he sand? So much of that I have to refer to my daughter because she helps me with these places where we have to come up with certain figures and times and dates. But it was started in there, was - I don't remember how long but it was quite some time with sand and gravel.

Q. Was it before your children were born?

A. Oh, yes.

Q. So, that would be longer than - how old is your oldest daughter?

A. Oh, I've forgotten. She was born in '33, I think.

Q. And so your husband's sand and gravel operations commenced before 1933?

A. Yes. Or long before that. I don't remember exactly. I've had no occasion to keep up with this.

Q. Have you ever seen anyone besides your family and friends hunt on this area of the Delony estate?

A. I've never seen anyone hunt on it but us, [p. 900] where we were hunting.

Q. Have you ever heard the name Houston, the Houston family?

A. Not until this thing came up. Never heard of them.

* * *

DIRECT EXAMINATION OF JOSEPH A. OLIVEROS

[p. 903] A. I'm responsible for the enforcement of the Federal Wildlife laws, particularly in north Louisiana. Of course, I work in adjacent states as well. But in this particular area that shows East Carroll Parish or a portion of it, that is just along the Mississippi River east of Lake Providence, I enforce Federal Wildlife laws along the Mississippi River of this portion and the - of course, the boundary that I use, I'd refer to maps such as this [p. 904] Geological Survey map and I use the state boundary lines outlined on there.

* * *

[p. 904] Q. When you have written cases dealing with law [p. 905] violations in that area, where have the cases gone to Court?

A. In this particular area all the cases that I recall writing in this particular area have all gone to Louisiana, Federal courts in Louisiana.

Q. And which particular city?

A. In Monroe, Louisiana.

* * *

DIRECT EXAMINATION OF MICHAEL MURRAY

[p. 907] Q. (By Mr. Keyser) Are you familiar with the accreted area adjacent to Lake Providence?

A. Yes, sir, I am.

Q. About how many times have you visited that area?

A. I would say it's in the neighborhood of 150 to 200 times.

Q. You have actually been out on the accretion?

A. Yes, sir, I have.

Q. Have you hunted in that area?

A. Numerous times.

* * *

[p. 908] Q. Have you enforced the Louisiana game laws in that area?

A. Yes, sir, I have.

* * *

[p. 910] Q. Where do your violations go to Court?

A. Either in East Carroll Parish or Federal court in Ouachita Parish.

Q. In Monroe?

A. Right.

Q. About how many violations have you written that went to Federal court in Monroe?

A. Approximately seven.

[p. 911] Q. And about how many have gone to the court in Lake Providence?

A. Two that I can recall.

Q. Have you written Federal violations?

A. Of the nine violations that I wrote there, seven were Federal.

* * *

[p. 913] Q. What types of violations or regulatory activity did you work in the river itself?

A. Mainly commercial/sport fishing, boating activities, duck hunting, just all types of hunting generally.

Q. Even though that area is a good deal to the east of the accreted area on the map?

A. That's correct.

Q. Have you ever seen any Mississippi Wildlife agents on the island itself on the accreted area?

A. No, sir, I haven't.

Q. All during the time that you were growing up as a boy living in lake Providence?

A. No, sir, I never have.

Q. Have you ever seen the Houston family out on the island?

A. No, sir, I haven't.

* * *

DIRECT EXAMINATION OF JOE CHATMAN

[p. 916] Q. And do you also work the accreted area known as Stack Island?

A. On the island itself, sir?

Q. Yes.

A. I have been over there on occasion, yes.

Q. About how many times have you been there?

A. Approximately in my years of service probably 12 times, 12 to 15, something like that.

Q. About how long have you been with Wildlife and Fisheries?

A. Fourteen years.

[p. 917] Q. Have you ever written any violations on the island?

A. To clarify, sir, are you talking about just the Tall Bridge part or just from the levee clean over to the river?

Q. From the levee to the river.

A. Yes, sir, I have written violations in that area.

Q. What types of violations?

A. Most of them have been for boating safety and commercial and fishing.

Q. And where do your cases usually go to court?

A. Sixth District Court of Lake Providence, state court, unless they're a Federal violation. In Monroe, Louisiana, District is Federal Court.

Q. Have any of your cases ever gone to court in Mississippi?

A. No, sir, they have not.

* * *

DIRECT EXAMINATION OF BILLY JACK MURRAY

[p. 922] Q. And you're familiar with the accreted area adjacent to Lake Providence?

A. Yes.

Q. Have you ever hunted on that land?

A. Yes, sir.

Q. Could you tell us how long you hunted there?

A. Probably started when I was around 12 years old. I haven't hunted the last 12, 15 years over there.

Q. Okay. When you did hunt there, did you do it [p. 923] with others?

A. Yes, sir.

Q. People from the Lake Providence area? Did you ever hunt with anyone from the Houston family?

A. No.

Q. Do you know the Houstons?

A. No.

Q. Have you ever seen them?

A. No.

Q. Have you ever seen any Mississippi people in the accreted area there at Lake Providence?

A. No.

Q. Have you ever seen any posted signs out on the island?

A. No.

* * *

Q. Have you ever seen any Mississippi people hunt in that area?

A. If there were, I didn't know it.

* * *

[p. 924] Q. You just have hunted there. have you ever seen any Louisiana Wildlife agents out there?

A. Yes.

Q. Ever seen any Mississippi Wildlife agents?

A. No.

* * *

[p. 925] Q. (By Mr. Keyser) You've lived in the Lake Providence area during the time that accretion was forming?

A. Yes.

Q. Could you describe to the Court, please, how it formed?

A. It just built up a sandbar, just a bar.

Q. And the willow trees started to grow?

[p. 926] A. Yeah.

Q. And it was attached to the Louisiana shore?

* * *

Q. (By Mr. Keyser) Could you describe to the Court, please, how the accretion formed.

A. Well, it just attached to the end of the isalnd [sic] right across the first chute right there, what we call Baleshed chute I think.

Q. And gradually built and built?

A. Uh-huh.

* * *

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In The
Supreme Court of the United States
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,
v. *Petitioners,*
THE STATE OF LOUISIANA, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II, PAGES 127-177

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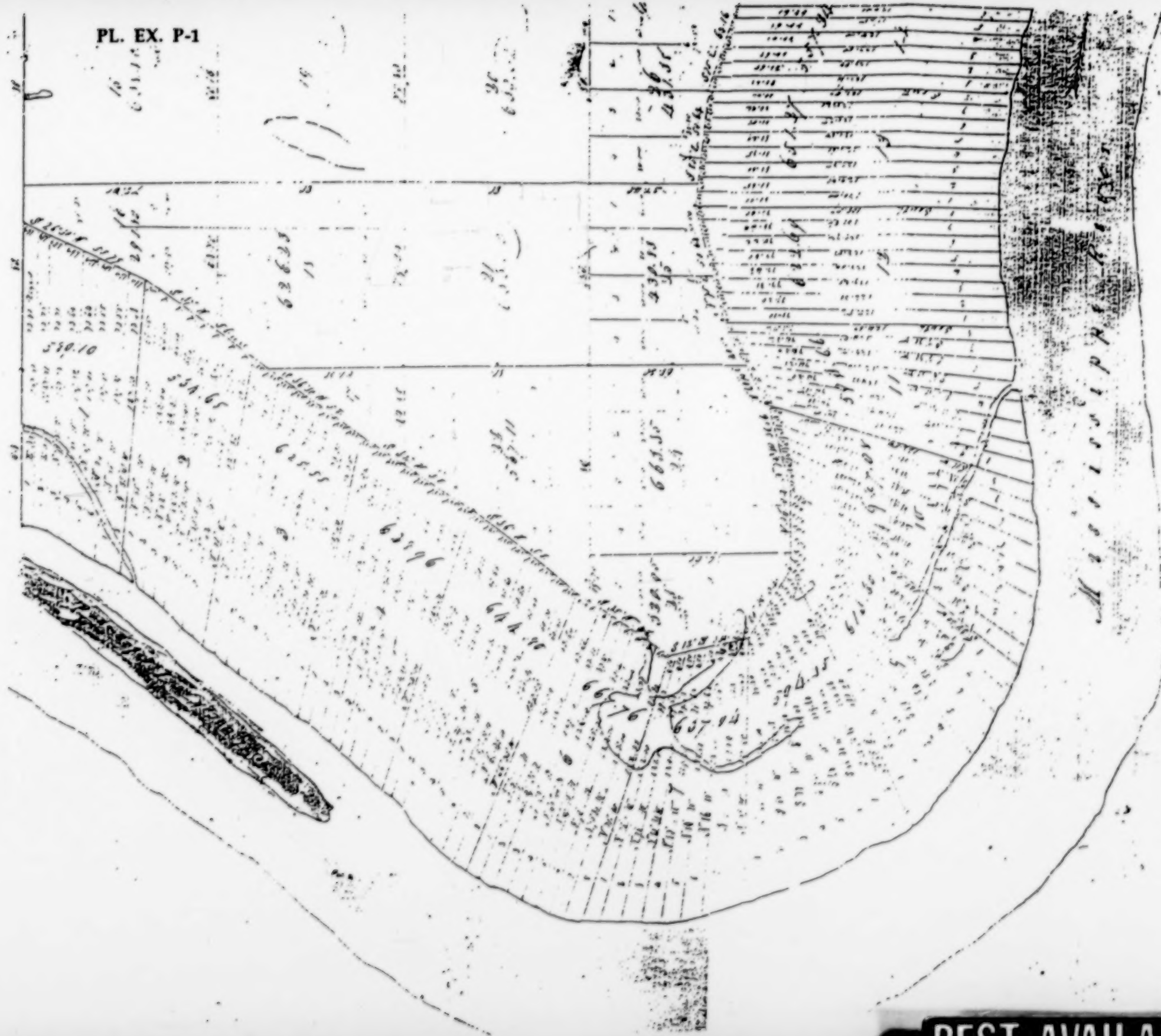
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TII R9 W, Choctaw District

PL. EX. P-1



Surveyed by S. A. Radlow, Deputy Surveyor in 1926 S. 25
 Surveyor Office - Washington, D. C.
 Examined & Approved
 2500

PL. EX. P-2

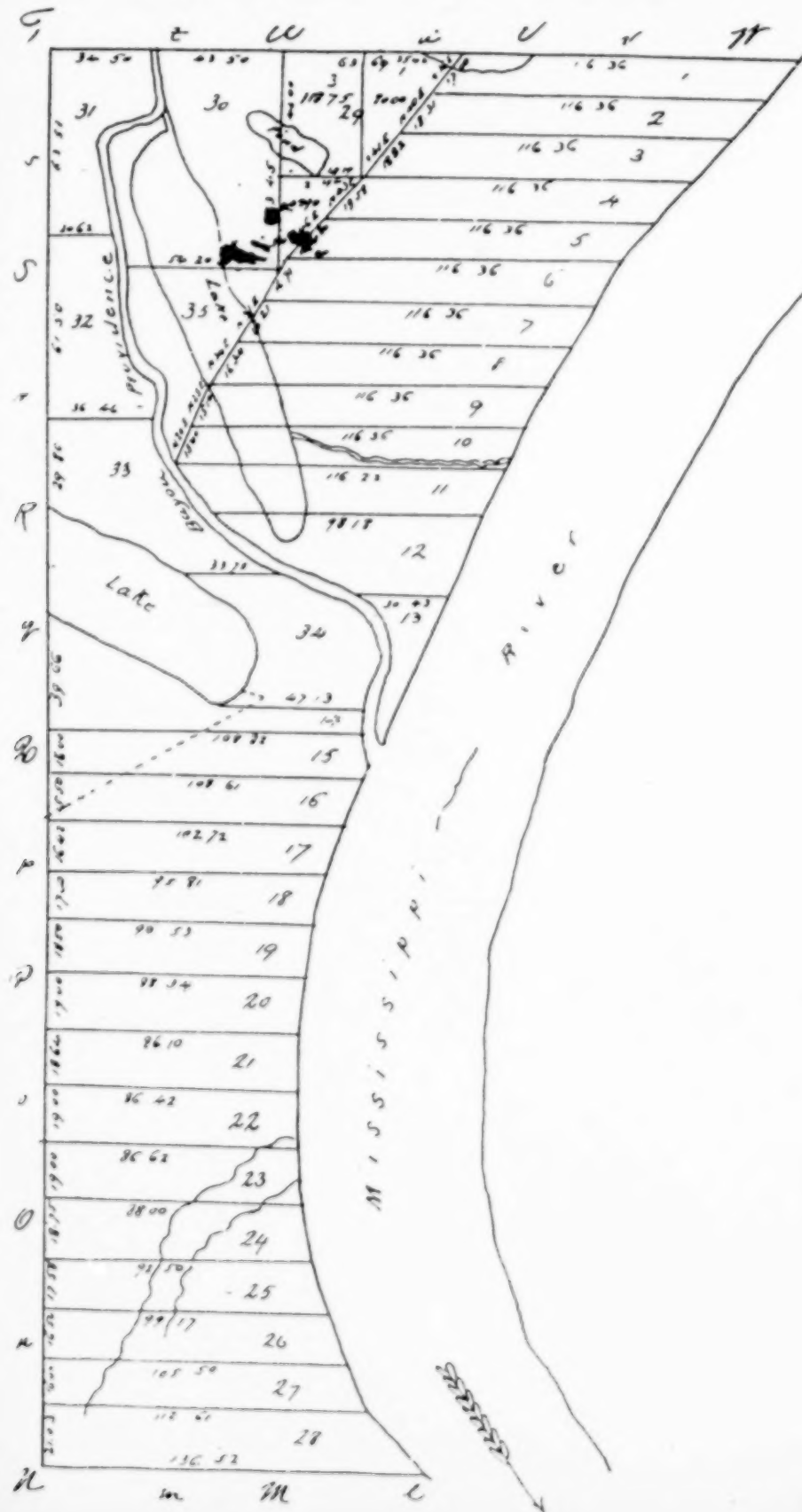
T. XXI, R. XIII, E.District North of Red River Louisiana

Table of Contents					
Sub	Area	Sub	Area	Sub	Area
1	166.11	13	67.47	25	159.71
2	161.74	14	181.83	26	170.97
3	163.71	15	174.41	27	174.82
4	165.35	16	165.14	28	263.18
5	159.52	17	164.27	29	244.45
6	168.02	18	159.04	30	378.83
7	163.02	19	160.65	31	161.32
8	158.24	20	165.28	32	167.71
9	160.92	21	162.25	33	217.83
10	165.96	22	163.26	34	178.55
11	173.34	23	164.92	35	127.10
12	193.58	24	169.48		
<u>1993.57</u>		<u>1898.50</u>		2244.47	
				1898.50	
				<u>1993.57</u>	
Total Area				6136.48	

The whole of this Township was surveyed by Daniel Livermore
Deputy Surveyor in the years of 1828 + 1829

Examined and Approved

Surveyor Office Washington Mo
June 30th 1829

Jas P. Turner

Surveyor of the Public
Land South of Tennessee

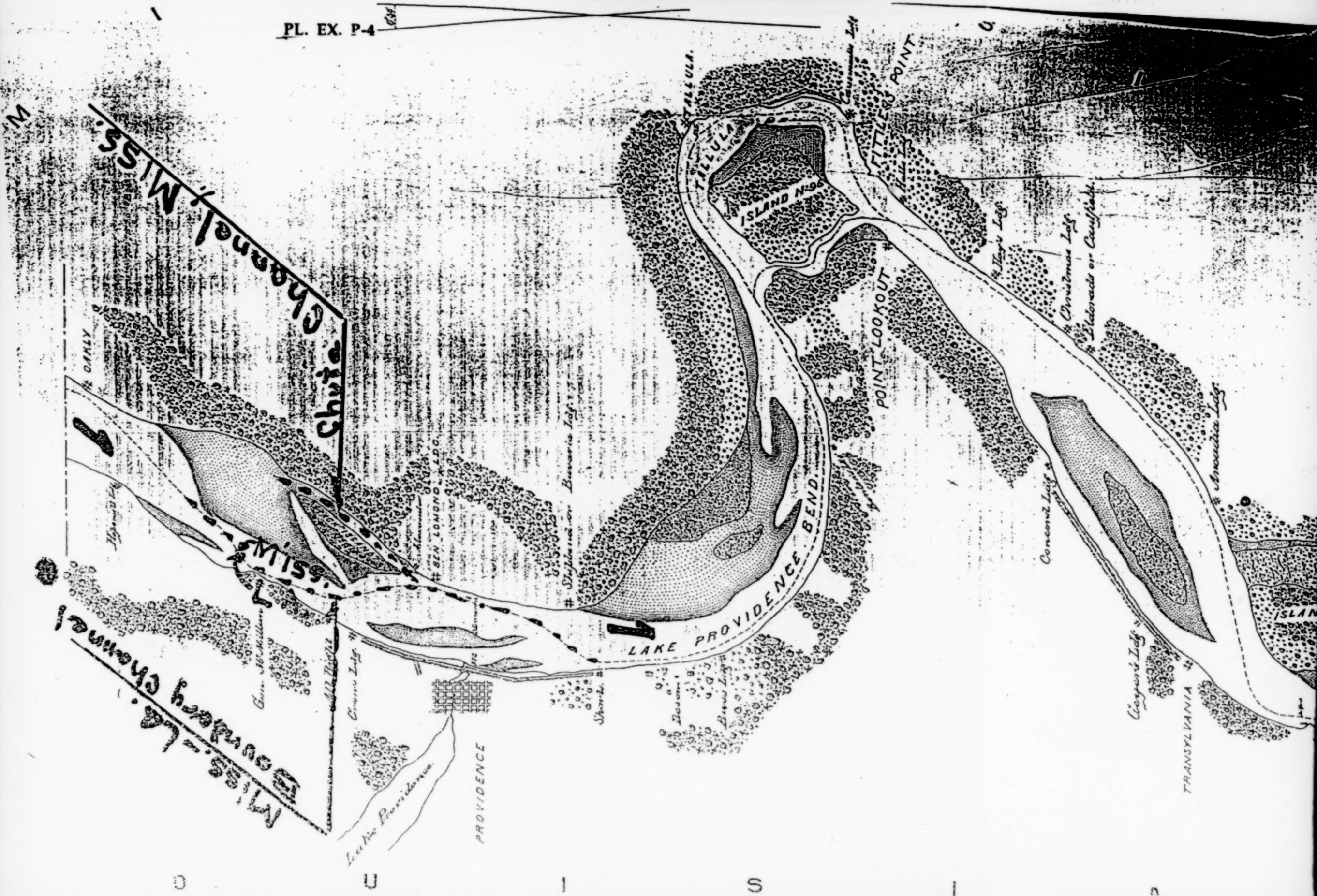
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PL. EX. P-3



PLAINTIFF'S
EXHIBIT
3

PL. EX. P-4



PL. EX. P-5

~~Superimposed
on Flannel Dikes and Lines~~

Qsl. 94 chute

MISSISSIPPI RIVER

PROVIDENCE

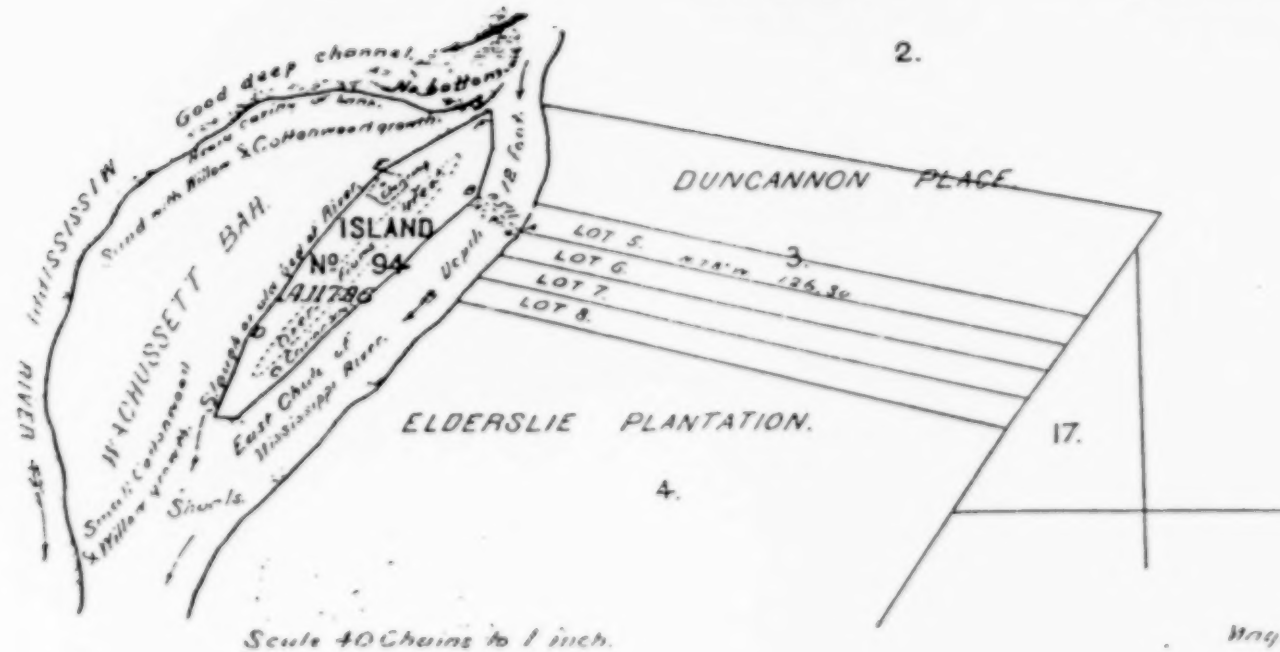
... a survey ... the direction of ... of Engineers, USA

PRUYNE, A. D.

PRUYNE, A. D.

vi. 1278H-2500f26.

PL. EX. P-7

MISSISSIPPI.
CHOCTAW MER. N & W*Duplicate*PLAT
OF
ISLAND 94,
T. 11 N. R. 3 W.
MISSISSIPPI.*Original plat transmitted to the State authorities
and duplicate to the U. S. Register at Jackson, Miss.
October 4. 1881.*

Paid Per Report

No 36786

DIV. 1 & 2

Mag. Var. 7 1/2 East.
Department of the Interior,
General Land Office,
Oct. 4. 1881.

The above diagram of Island No. 94, in Township No. 11 N. Range No. 3 W., Choctaw Meridian, in the State of Mississippi, is a correct plat of Survey executed by David Strickland, Deputy Surveyor, in pursuance of instructions received from the Commissioner of the General Land Office, bearing date the 12th day of July, 1881, and is strictly conformable to the field notes of the Survey thereof, which have been examined and approved.

A. B. McFarland

Commissioner and
Ex-Officio Surveyor General

*Entered in tract book July 12/1882
no C*

POCI

PLAINTIFF'S
EXHIBIT
7

PL. EX. P-13

Chuta Channel

MISSISSIPPI

ry chan.

MRCA-1-4

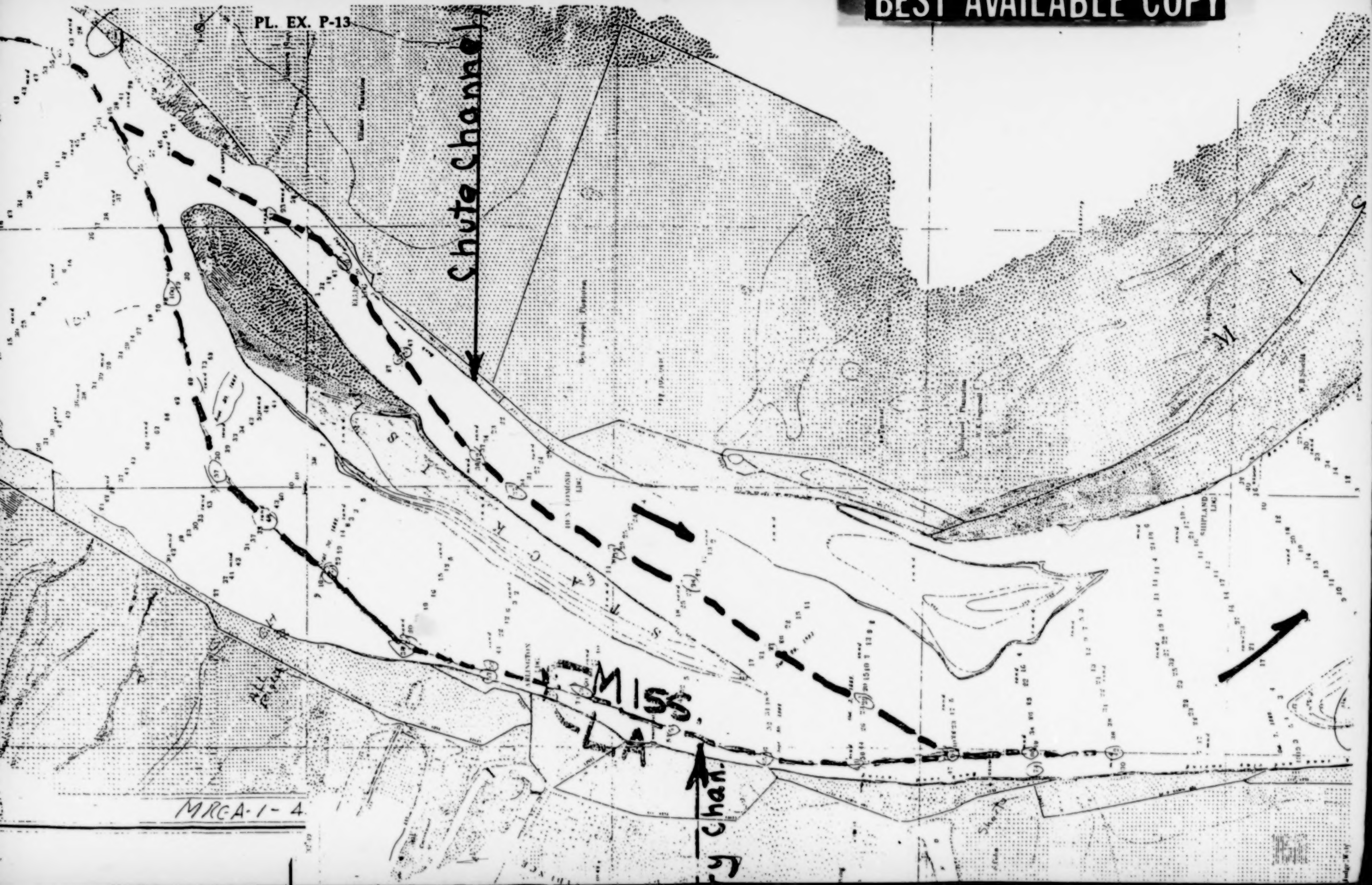


PLATE NO. 1 EXHIBIT NO. LA-1A

DESCRIPTION: TWO MAPS: (1) LA-1A, (2) LA-1A WITH NOTATIONS. VICINITY MAP COMPOSITE OF USGS QUADRANGLES ON WHICH THE FOLLOWING ARE SUPERIMPOSED: (a) THE 1881 LOCATION OF STACK ISLAND, (b) THE CLAIMED BOUNDARIES BY PETITIONERS AND RESPONDENTS, (c) NOTATIONS BY LOUISIANA.

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1-2

PLATE NO. 2 EXHIBIT NO. LA 16 AND LA 16A

DESCRIPTION: TWO MAPS: (1) LA 16 AND (2) LA
16A. USGS QUADRANGLES, EDI-
TIONS OF 1911 AND 1909, SHOW-
ING THE STATE BOUNDARY AND
MAIN NAVIGATION CHANNEL IN
THE CHUTE CHANNEL EAST OF
STACK ISLAND. WITH NOTA-
TIONS BY LOUISIANA.

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 3 1/4

PLATE NO. 3 EXHIBIT NO. LA 18

DESCRIPTION: ONE MAP: LA 18. COMPOSITE MAP
OF SHEETS 79, 80 & 81 OF THE
1925-26 MISSISSIPPI RIVER COM-
MISSION HYDROGRAPHIC SUR-
VEY, WITH LIVE THALWEG OR
MAIN NAVIGATION CHANNEL
SUPERIMPOSED.

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO. 5

PLATE NO. 4 EXHIBIT NO. LA 18A

DESCRIPTION: TWO MAPS FROM LA 18A, *IN GLOBO*. AN EXCERPT WITH BASE MAP TAKEN FROM THE 1883 REPORT OF THE MISSISSIPPI RIVER COMMISSION. DESCRIBES IN DETAIL THE LOCATION OF THE MAIN NAVIGATION CHANNEL IN 1881 ON PAGES 423, 425, AND THE ATTACHED MAP, AND THE PROJECT TO DIVERT THE RIVER TO THE WEST OF STACK ISLAND. 1881 AND 1883 TRACKS OF NAVIGATION AND NOTATIONS SUPERIMPOSED BY LOUISIANA.

LOUISIANA EXHIBIT LA-18A

[p. 422] REPORT OF THE
MISSISSIPPI RIVER COMMISSION.

These estimates considerably exceed that made for the Board of Engineers which convened at Memphis, September 4, 1882, but have been deduced from careful survey. More than one-half the water that escapes into the Tensas Basin flows through the gaps above Arkansas City, and there is now an effort being made by the State of Louisiana corporations, and private individuals in Arkansas to the effect closure of this line, and a contract for the work has been made by them. If the reduction of the notes can be made in time the results of the survey will be incorporated in this report before finally submitted to Congress.

FINANCIAL STATEMENT.

Amount allotted	\$1,000.00
Expended:	
Instruments and outfit	\$51.75
Services	386.66
Subsistence	35.00
Miscellaneous	23.05
	<hr/>
	496.04
	<hr/>
Balance available November 1, 1883	503.96

SURVEY OF CHOCTAW BEND BEACH.

At the date of the last annual report of the commission the survey party under Assistant Engineer William T. Blunt was in the field. The survey was begun November 17, 1882, and completed and the party returned to Wilson's Point December 30, 1882.

The survey was restricted to the hydrography proper, the shore line as determined by Assistant Engineer Ockerson the preceding year being accepted, except where caving banks rendered new locations of shore lines necessary.

The survey extended from Cook's Point to Arkansas City, a distance of 28 miles. The survey shows that there was not less than 13 feet of water at a stage corresponding to a gauge reading of zero on the Arkansas City gauge, or that there existed no obstruction to navigation in 1882, low-water season.

A complete project for the improvement of the reach will be submitted with the maps at the earliest practicable moment. For the present there is no especial demand for its improvement, except the revetment of the upper and lower banks of Cook's Point neck, where it is caving and a cut-off imminent. This requires 7 miles of revetment, at a probable cost of \$513,000, if carried to the top of the bank, or \$210,000 if restricted to a subaqueous mat. The caving is now back to the cypress swamps, and the material is, as usual in slowly-deposited banks, heavy buck-shot, very tough and difficult to cave. The banks, however, are wearing quite rapidly, and the configuration of the river points to a cut-off. The neck now is nearly a mile wide, but low, the water flowing across at several

feet below the ordinary high water. At the up-stream side of the neck is Persimmon hollow, leading into Long Lake, which occupies the middle of the neck, and drains out through Cypress Bayou, on the lower side of neck. The danger lies in this low depression, already sufficiently lowered to cause quite a deep channel-way across at high water, obstructed, however, by a thick undergrowth of cypress, willow, and cottonwood, and accumulated drift-wood.

The report of Assistant Engineer Blunt is herewith.

FINANCIAL STATEMENT.

To amount allotted \$4,000.00

Expended:

For services	\$1,587.92	
For subsistence.....	495.06	
For tools and supplies.....	531.36	
Miscellaneous	65.52	
		<hr/>
		2,679.86
		<hr/>
Balance available November 1, 1883		1,320.14

L i.

REPORT OF ARTHUR HIDER, ASSISTANT ENGINEER, UPON OPERATIONS
OF THE LAKE PROVIDENCE CONSTRUCTION PARTY.

WILSON'S POINT, LA., November 15, 1883.

SIR: The following report of operations of the Lake Providence construction party from December 1, 1882, to November 1, 1883, is respectfully submitted.

The work undertaken in accordance with your instructions, and that which has so far been executed has had in view the following objects:

[p. 423] The narrowing of the width of the river in places where it was excessive, to bring the regularized channel within the boundaries fixed in accordance with the original project, by the following methods, viz:

First. The closing of the Duncansby and Skipwith chutes by the construction of a system of pile dikes at and near the head of the Duncansby chute. The filling up of the steamboat channel, which was between the upper and the lower towheads, by the construction of a pile dike joining the two bars and the concentration by this means of the water on the right of the towheads, so as to permanently fix the channel next the Louisiana shore and prevent the further caving of the banks in the Skipwith chute.

Second. The closing of the Mayersville chute by a pile dike across the head, and others in the chute further down, and the protection of the channel side of Mayersville Island by the construction of willow mattresses and revetting the front face of the island to prevent further caving, so as to retain the channel of the river in its present location.

Third. The closing and silting up of the chute between the Baleshed Bar and the Mississippi shore and the prolongation of the Baleshed Bar at its upper and

lower extremities by a system of dikes placed longitudinally and normal to the direction of the current, for the purpose of restricting the width of the river along the Vista and Longwood fronts within such limits as would afford a good channel at all stages and prevent the river passing to the Mississippi side into the Baleshed Chute.

Fourth. The closing of the main channel of the river, which passed between the foot of Baleshed Bar and the head of Stack Island, and bringing it back to the right of Stack Island by a system of deflecting dikes located on the Louisiana side at Elton Bar, and a longitudinal dike, driven across the channel between the lower end of Baleshed Bar and the head of Stack Island, so as to prevent further caving on the Mississippi shore behind the island, which had already done a great deal of damage and was increasing at an alarming rate.

The objects sought to be obtained at all these points have, to a great extent, already been accomplished, as shown by comparative soundings and surveys furnished by the survey party, which accompany this report.

The lack of stone to properly secure the revetment work done in November and December of last year along the face of Mayersville Island, was the cause of the caving of the bank in rear of the mattress work. This would, no doubt, have been prevented had material been available to properly secure the work.

DESCRIPTION AND EFFECTS OF WORK DONE.

Duncansby chute. - During last season a system of low-water dikes was constructed at the head of this

chute, the two upper dikes and the main dike at the head consisting of two rows of piling, securely braced. These dikes were provided with light brush footmats, loaded with stone, laid between the piling, and had screens or open hurdle work placed in front of them.

The three lower dikes across the chute consisted of single rows of piles with screens or open hurdle work in front.

All these dikes did good service and caused a heavy deposit in the chute during the high water; in many places the fill extended to the top of the piles.

The main dikes A and B built last season, connecting the upper and lower towheads, accomplished the result desired, viz, the filling up of the steamboat channel, before existing between the upper and lower towheads; the fill here also extended nearly to the top of the piles. The two bars are now one, and even at high water there is no channel between them.

There has been a general enlargement of the bars in front of Duncansby, and a shoaling of the chute along its whole length. At low water this season a skiff would not float between Duncansby and Skipwith Landing, and at the head of the chute the bar was entirely above water, no water at all entering the chute at the upper end. Skipwith Landing was moved down nearly a mile nearer the mouth of the chute on account of shallow water, to enable steamboats to deliver freight.

On account of the rapid caving which took place during the high water in the bend above Pilcher's Point, deflecting the main current across the river immediately

above and against the dikes at the head of the chute, seriously threatening the work heretofore put in, and together with the rapid caving back of the upper Duncansby towhead, which had been left unprotected; in accordance with your direction, four additional dikes, Nos. 5, 6, 7, and 8, were driven during the high-water stages across the chute, extending as close to the shore as the depth of the water would permit; dike No. 6 consisting of three rows of piles, with a woven mattress 130 feet in width, made in sections of from 100 to 200 feet, overlapping each other, sunk in rear of the dike.

The two lower dikes, Nos. 7 and 8, were provided with thick grillage mats between the piling. These dikes, where the water was shallow, consisted of two rows of piling [p. 424] securely braced, and where the water was of greater depth than 15 feet of three rows. In addition to these precautions a protection dike with a woven mat 100 feet in width, with a screen hung in rear, was driven immediately in front of the caving towhead, and afterwards a mattress placed across the head, lapping around the towhead, was constructed. On the inside the mattress was badly broken up in sinking on account of the bluff bank. This work failed to hold the towhead and has been swept away. The whole force of the river at high water was against the head of the towhead, which is of sand. The dikes put in withstood the high water and show a fill behind them. Gaps were washed out in the low-water cross-dikes constructed last season where they joined the main dike, and also in those further down in the chute; part of this main dike was also scoured out, the channel at low water being in close proximity to the remaining

part. The piles were removed so as to leave as wide a channel as possible.

The effects of this system of dikes is shown in plate herewith, in which the surveys of February, 1882, and October, 1883, are compared; the bar lines are shown at low-water stage, viz, 1'.5 on Lake Providence gauge. For location of dikes, &c., see accompanying map.

Mayersville Island and Chute. - During last season a woven mattress from 100 to 130 feet in width was constructed along the face of the island, beginning at the head and extending down 7,500 feet. The bank was graded by the hydraulic graders, and the upper 1,550 feet revetted on the channel side, the revetment lapping around the head and extending down the chute side about 350 feet. The revetment was constructed by placing a layer of brush along the slope, which was held in position by stakes driven in the bank, to which stringers or binders holding the brush together were securely fastened with wire.

Behind the greater part of the mattress the slope had no protection at all, as it was impossible to get brush and stone in sufficient quantities to finish this work before the high water.

The effect of the high water on the face of this island, which had before been caving rapidly, was, except for about 1,800 feet at the head where the revetment had been partially covered with stone, or held down by sacks of sand, to cave the bank behind the mattresses. The caving has extended from 50 feet at the upper end, to 500 feet at the lower end, back of where the original mattress was sunk, and has rendered necessary the construction of

a new mattress along nearly the entire length of the face of the island, which is now in progress. The cause of the caving back of the island was undoubtedly from the fact of not having sufficient brush to complete the revetment, and stone to hold the bank protection in place, as the island itself is composed nearly altogether of sand.

Had it been possible to have finished the revetment and covered it with stone behind the mattress work as it progressed, it is believed that further caving back of the island would have been prevented. The low-water dike built across the head of Mayersville chute has remained intact, not a break having occurred. The dike here shows good results by the shoaling of the water behind it and the enlargement of the bar at the mouth of the chute, and the increase in size of the towhead near the head of the island.

Further down, the chute has deepened at some places, and in order to prevent further scouring, in accordance with your instructions, dike No. 1, consisting of five rows of piling securely braced, was driven across the chute opposite Mayersville Landing to aid the main dike at the head in filling up the chute. Dikes 2, 3, 4, and 5, built the previous season in the chute, were only partially completed; no particular effect has been observed from the action of these dikes; they are located too far down to aid much in filling up the chute. A sketch showing the condition of the works, November 1, 1883, in this locality is shown in map herewith.

Baleshed Bar and Chute. - The work at this point has been the construction of a main dike extending from the Mississippi shore below the front of Mayersville down

the river 15,000 feet, reinforced by a system of cross-dikes between the main dike and the shore. Dikes 1, 2, 3, 4, and 5 at the upper end, extending to the Mississippi shore, the parts of dikes 4 and 5 nearest the bank, as well as part of 10 and 11 and the whole of 12 were constructed as low-water dikes, part of the main dike between cross-dikes 1 and 4 is also a low-water dike. These dikes were built previous to December 1, 1882, and stood during the last high water with little damage. They are shown on the sketch by dotted lines. The cross-dikes from 1 to 7 have thick grillage foot-mats constructed between the rows of piling, held in place by rock, or the mats fastened to the piling by stringers spiked to them and weighted, and held in place temporarily with bags filled with sand, until a supply of rock can be obtained, and the river is at a high enough stage to allow the stone to be floated on barges to the dikes. The pile-driving done this season at this locality was during the high water, and these dikes may be considered as high-water dikes. The upper part of the main dike has been wattled from cross-dike No. 1 to the Mississippi shore along the middle row of piling up to the 20-foot stage; also dike 1. This work is being continued down from the head of the system, as rapidly as possible. A woven mattress from 40 to 100 feet in width has been constructed in [p. 425] front of the main dike from No. 4 cross-dike to No. 11, to prevent scour. The dike when not provided with a woven mattress in front will have a thick grillage foot-mat constructed between the rows of piling, which is now being done. This will complete the work as laid out at this locality in accordance with your instructions. The general effect of the work here has been -

1st. The enlargement of the Baleshed Bar, both in size and height, and the lengthening of the bar by accretions, both at its head and at the foot.

2d. The filling up of the Baleshed Chute at its upper end, and the enlargement and deepening of the channel along the Vista and Longwood fronts.

3d. The prevention of the threatened crossing of the river between the foot of Mayersville Island and the head of the Baleshed Bar, behind the bar, and down the Mississippi shore.

4th. The filling up of the old crossing between the foot of the bar and the head of Stack Island. For location, &c., of this work see accompanying map. ←

→ *Stack Island.* – In order to force the main channel of the river, which flowed down the Stack Island chute, on the outside and along the face of the island between it and the Elton Bar, a main dike consisting of two rows of piles was driven from a point below the foot of Baleshed Bar to the head of Stack Island, leaving the low-water channel from Longwood through the Stack Island chute open for the passage of boats. This dike was driven as a low-water dike; a grillage foot-mat was constructed between the piles, beginning at the head, as far down as could be put in before the high water covered the dike. During high water this work showed good results, forcing the main channel of the river to the right of the island and building a bar to the head of Stack Island, as shown by the high-water survey of April, 1883. As the river fell to low-water stage the difference of slope on the chute side and the main river was so great, caused by the system of dikes at the upper end of Baleshed preventing

the water from freely entering the upper end of the chute, as to render the current extremely rapid through this dike, resulting in cutting off the top of the bar in front of the dike, and finally carrying away part of the dike near the head of Stack Island. This was replaced and again broken by a sunken barge lodging against it. The break has again been repaired and a grillage foot-mat sunk between the rows of piling. The current passing across the head of Stack Island will be materially lessened as the river rises, and the slope on both sides of the island is more nearly equalized. A channel across the head of Stack Island is not anticipated, as at high water the works on Baleshed Bar above, will be sufficient to cause the bar to again form at a greater height than before, and it is believed entirely stop any water passing into the chute at this point at next low water. For location of dike-work see map herewith.

Elton Bar. – The work here consisted in the construction of a main dike and six short cross dikes, at the head of Elton Bar and in the chute, to act in deflecting the channel across the river toward the head of Stack Island, auxiliary to the Stack Island main dike, and to close the chute, which was rapidly enlarging, along the Louisiana shore and caving the banks at a very rapid rate, and thus concentrate the water in one channel; as when the works were put in it was difficult to determine which of these channels the river would take, behind Stack Island, along the Louisiana shore, or whether it could be concentrated between Stack Island and the then large Elton Bar. Parts of these dikes were carried away by drift during the high water, but not before they had accomplished the desired result. For location of these dikes see map herewith.

METHODS OF CONSTRUCTION.

Dike work. – No material change has been made in the methods employed in the construction of pile dikes from those of last season. The principal change has been in making the dikes of a greater number of rows of piles. The distance between the rows has been increased from 10 to 15 feet in deep water to allow of more secure bracing as well as the thickness and width of the brush work laid at the foot of the dikes to protect them from the actions of the current and prevent scour. The experience of last season's work showed conclusively that the strongest form of construction is required in order to withstand the force of the current at high water, and has led to putting in work of greater strength where exposed to the action of drift.

Pile driving and bracing. – The plan pursued in building pile dikes has been to drive the front and rear rows of piles simultaneously when it could be done, fasten the longitudinal stringers to the piles, and complete the dike by putting in place the cross-braces. In all cases the longitudinal and cross-braces, in addition to being fastened to the piling with spikes, have been well wired with No. 8 wire passed around the pile and across the brace diagonally from the upper to the lower edge, and made taut by twisting. This was rendered necessary on account of the material used for both piles and [p. 426] braces, which is almost entirely cottonwood; but few cypress piles have been used. The piles have been sunk as deep as possible, generally from 15 to 20 feet, depending upon the nature of the bottom. Two forms of bracing have been used, as shown in the sketches, one with rods, for dikes constructed at high-water stage, and the other for

dikes built during low water. These are the same methods used, in accordance with your directions for last season's work, and have answered the purpose well; experience has suggested no improvement upon them. The piles have been sunk by the use of a jet of water forced through a 1 1/2-inch gas pipe, leading down the side of the pile, and by the aid of quick blows from a hammer of 2,000 pounds falling through a distance of about 6 feet.

Two forms of pile-drivers have been in operation, one with the leads placed in front of the boat, and the other with the leads on the side. The first form is preferred for general use, especially for cross-dikes and in rapid currents, as being found more convenient to keep in position and handle, and for this reason accomplishing more work. One of the side-lead drivers has been in operation, and has done fair service. These drivers are provided with large boiler capacity and pumps capable of discharging more water under a greater pressure. Piles can be sunk deeper with these than with the others, but the difficulty of handling them in cross-currents reduces their efficiency.

Between 15 and 20 feet has been the average depth of penetration obtained; after reaching that depth, if further sinking is not stopped by gravel, buckshot, or other hard material, the frictional resistance exerted by the sand along the side of the pile generally prevents further penetration. This resistance could not be overcome either by the use of the water-jet or the hammer, or both combined, as the wood of which the piles are composed will not withstand, without splitting, the shock of the hammer falling from a great height. The usual method has been to sink the piles with their large ends down; the butts are

cut off square, and are about 18 inches in diameter, the small ends not less than 10 inches diameter, and the length of the piles from 35 to 50 feet; about ten piles is counted as an average day's work for one driver with a crew of seven men, consisting of a foreman, engineer, and five laborers. No special improvement in the methods followed in pile sinking or in the construction of drivers has suggested itself. They are well adapted for the purposes for which they were designed. Four different kinds of hoisting engines are in use, each of which has an advantage in some particulars over the others; on the whole the small horizontal engines have given the best results, being quicker in operation, and, next to the ordinary crab in use on four of the drivers, costing less for repairs on account of breakage.

Brush mats, hurdles, &c. - The principal dikes have been protected at their foot to prevent scouring out, by constructing mats formed of two, three, or four layers of brush, depending upon the importance of the dike, rapidity of current, depth of water, and danger of cutting out. These layers of brush are placed alternately crosswise and parallel with the dike. Stringers, or waling-pieces, as binders, are first hung from the piles as a framework for the brush to be laid upon. When the mat is of sufficient thickness other binders are laid on top of the mat connected with those underneath by wires at suitable intervals, leading up from the under stringer pieces, twisted together so as to make the construction as close as practicable. The brush is laid so as to extend through the rows of piles, requiring on some of the dikes three lengths of brush, the brush ends overlapping the butts. When finished, the mat extends both in front and rear of the dike

from 10 to 15 feet outside the dike. The grillage mats thus constructed are then sunk in place by being loaded with rock taken to the dike on barges. When woven mats are placed in front of dikes to prevent longitudinal scour they have been built similar in construction to the large mattresses used for the protection of caving banks, and sunk in place by being loaded with rock. For the purpose of preventing the threatened deepening of the Duncansby chute during high water, a brush foot-mat 130 feet in width, made in sections of from 100 to 200 feet in length, was woven on a mattress barge in rear of dike 6, which extends across the chute near the head. Alternate sections were built and sunk. The intervening ones were then constructed so that when in position on the bottom they overlapped the sections previously built about 10 feet, thus forming a continuous brush foot-mat 130 feet wide immediately in rear of dike. The dike itself was constructed of three rows of piles securely braced. In order to insure the mats, when sunk, being close to the dike a strong stringer was spiked and wired across the ends of the weaving poles, which were allowed to extend through the dike beyond the rear piles, thus forming a crib around each pile. Before sinking, the mats were covered with stone, evenly distributed, the upper side of the mat being lowered to its place by the aid of lines fastened to the front row of piles, which were slacked as the mat went down, so as to keep it in a horizontal position. The only curtain construction used this season was that placed in rear of the protection dike built in front of the upper Duncansby towhead. This was of the usual form of woven work, built so as to allow of about one-foot spaces between the brush. It [p. 427] was sunk

by fastening sacks of rock to the curtain, to counteract the force of the current and hold it in position.

The wattling or hurdling has been made close by forcing the pieces of brush down so as to be in contact with each other, and has been done on either the middle or front row when the brush mats are built between the rows of piling so as to provide against the effect of the overfall cutting out the sand in rear of the dikes. Sketches giving details of the different forms of construction employed in the dikes built and their location is shown on map herewith.

The following statements furnished by Assistant Engineer C. P. Ruple, gives in detail, in tabulated form, the work done in dike construction; also an estimated cost for labor for the different classes of work, and amount of material required. All the pile-driving done has been under his charge, and since June 1, 1882, at which time the foot-mat party under Assistant Engineer E. D. Thompson was consolidated with the pile-driving force, this class of work also.

*Statement showing dike work from
December 1, 1882, to November 1, 1883.*

Location.	Dike.	Feet driven since December 1, 1882, standing November 1, 1883.	Washed out and replaced during construction.
Duncansby ..	Duncansby Bar protection.	340
Do	Main dike A		250
Do	No. 1	100	
Do	No. 3	150	
Do	No. 5	545	
Do	No. 6	2,105	275
Do	No. 7	2,061	
Do	No. 8	2,310	
Mayersville..	Main dike...	2,300*	
Do	No. 1	805	
Baleshed	Main dike above 1	1,901	
Do	Main dike from 3 to 7..	2,837	1,021
Do	Main dike from 7 to 11	6,903	
Do	No. 1	933	
Do	No. 2	1,192	
Do	No. 3	1,172	
Do	No. 4 of 1883	661	469
Do	No. 5 of 1883	983	153
Do	No. 6	1,452	150
Do	No. 7	1,204	500
Do	No. 8	1,011	150

Do	No. 9	1,097	
Do	No. 10	924	
Do	No. 11	894	
Do	No. 12	583	
Stack Island .	Main dike...	5,250	1,429
Elton.....	Main dike...	943	857
Do	No. 1	746	54
Do	No. 2	887	63
Do	No. 3	975	
Do	No. 4	300	356
Do	No. 5	484	40
Do	No. 6	435	
Totals	44,235	6,432

* Three hundred feet of this dike is incomplected.

Of the above dike there is in -

Single row	2,336
Double row	25,187
Three rows	14,150
Four rows	565
Five rows	1,997
Total	44,235

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SEE FOLDOUT NO 6-7

PLATE NO. 5 EXHIBIT NO. LA-19

DESCRIPTION: ONE MAP: LA-19. COMPOSITE OF
SHEETS 66 AND 69 OF 1930 LOW
WATER SURVEY BY MISSISSIPPI
RIVER COMMISSION SHOWING
CONFLUENCE BAR ACCRETION
BELOW STACK ISLAND. MAIN
NAVIGATION CHANNEL SUPERIM-
POSED WITH NOTATIONS BY LOU-
ISIANA.

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
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OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 8

EXHIBIT NO. LA 32G

DESCRIPTION: GEOLOGICAL INVESTIGATION OF
THE ALLUVIAL VALLEY OF THE
LOWER MISSISSIPPI RIVER

WAR DEPARTMENT
CORPS OF ENGINEERS,
U.S. ARMY
BY HAROLD N. FISK, PH. D.
ASSOC. PROFESSOR GEOLOGY
LOUISIANA STATE
UNIVERSITY

WAR DEPARTMENT
CORPS OF ENGINEERS, U. S. ARMY

GEOLOGICAL INVESTIGATION
OF THE

ALLUVIAL VALLEY OF THE
LOWER MISSISSIPPI RIVER

CONDUCTED FOR THE
MISSISSIPPI RIVER COMMISSION
VICKSBURG, MISS.

PROPERTY OF THE
UNITED STATES GOVERNMENT
US-CE-C
MISSISSIPPI RIVER COMMISSION
LIBRARY
VICKSBURG, MISSISSIPPI

By

HAROLD N. FISK, Ph. D.

Assoc. Professor of Geology

LOUISIANA STATE UNIVERSITY

Consultant

LA-32G

[p. 51] 1, 7, plate 24). Fine-grained silty and clayey sediments offer a greater resistance to bank recession than do sandy sediments because of their lower permeability, greater cohesion, and their more compact nature. These properties permit a steeper subaqueous profile of equilibrium to be maintained than do those of sandy sediments.

(See plate 24, diagrams 2, 3, and 4 for a contrast between two subaqueous profiles developed in sandy bed and bank materials and one developed in silty sediments in the same area of bank recession on the east bank of the river below Mayersville, Miss.)

Bank recession by slumping causes the subsidence and bankward tilting of bank sediments in blocks or large masses. Slumping is the adjustment caused by the removal of sandy sediments from beneath the more cohesive topstratum (see diagrams 5, 6, plate 24). Cracks caused by incipient slumping, in the areas of relatively thin topstratum landward of the active caving bank, may show a small amount of displacement before slumping takes place. The size of the slump block varies directly with the thickness of the topstratum, and cracks are not present far from the active slump plane in areas of thick topstratum.

Bank recession takes place by continuous sloughing of sands in areas where there is little strength to the topstratum and where sand comes close to the surface, as in river bars. Small blocks may slump into the river; but, after slippage of the mass takes place, these blocks quickly disappear and the shores become generally smooth or broadly arcuate (plate 24, diagrams 6 and 7).

Most of the actively caving banks of the river stand nearly vertical above the mean low-water line. The vertical attitude is maintained by slow attrition as lateral corrosion by the river undermines the bank at the water's edge and permits thin segments of the bank face above water level to fall into the river. This process of undermining is termed "sapping" and appears to be a relatively

unimportant means of banks recession (see plate 24, diagram 7).

Bed Materials and the Shape and Migration of Bends. A meander of a stream flowing in uniform bed materials exhibits a smooth and regular outline and migrates downstream in an orderly manner. In the Mississippi meander belt, however, most migrating bends encounter local resistant bank sediments which slow the rate of bank recession and change the downstream alignment of the river and the directive of stream attack. Irregularities in migration often result in the formation of a disturbed or abnormal meander and eventually lead to the cut-off of the meander loop. The control which is exerted by clay plugs on bend migration and the shaping of bends is illustrated by the development of the meander loops in the vicinity of Lake Lee. Irregularities in channel migration in this area led to the formation of the American Cut-off in 1858 (figure 57).

Reaches. Reaches occur along the Mississippi channel in many places where a relatively constant alignment of the river has been maintained. They are found downstream from some of the points where the river impinges against the valley wall. They also occur in floodplain areas below cut-offs and in places where the alignment is controlled by resistant sediments. River history points to the development of some reaches through a succession of cut-offs in a local area where meander loops are developed on both sides of the axis of a meander belt. As successive cut-offs occur, the river position becomes established between infacing cut-off meanders whose arms have been filled with clay plugs. River alignment is controlled by these relatively resistant channel fillings,

and as cut-offs continue, channel migration become localized to a zone of decreasing width. A reach is formed when the zone of migration becomes so narrow that meander loops can no longer develop. Lake Providence Reach (figure 58) is considered to have formed in this manner. The effectiveness with which clay plugs confine the zone of river migration and prevent the development of meander bends is determined by the spacing, thickness, and toughness of the old channel fillings bordering the reach.

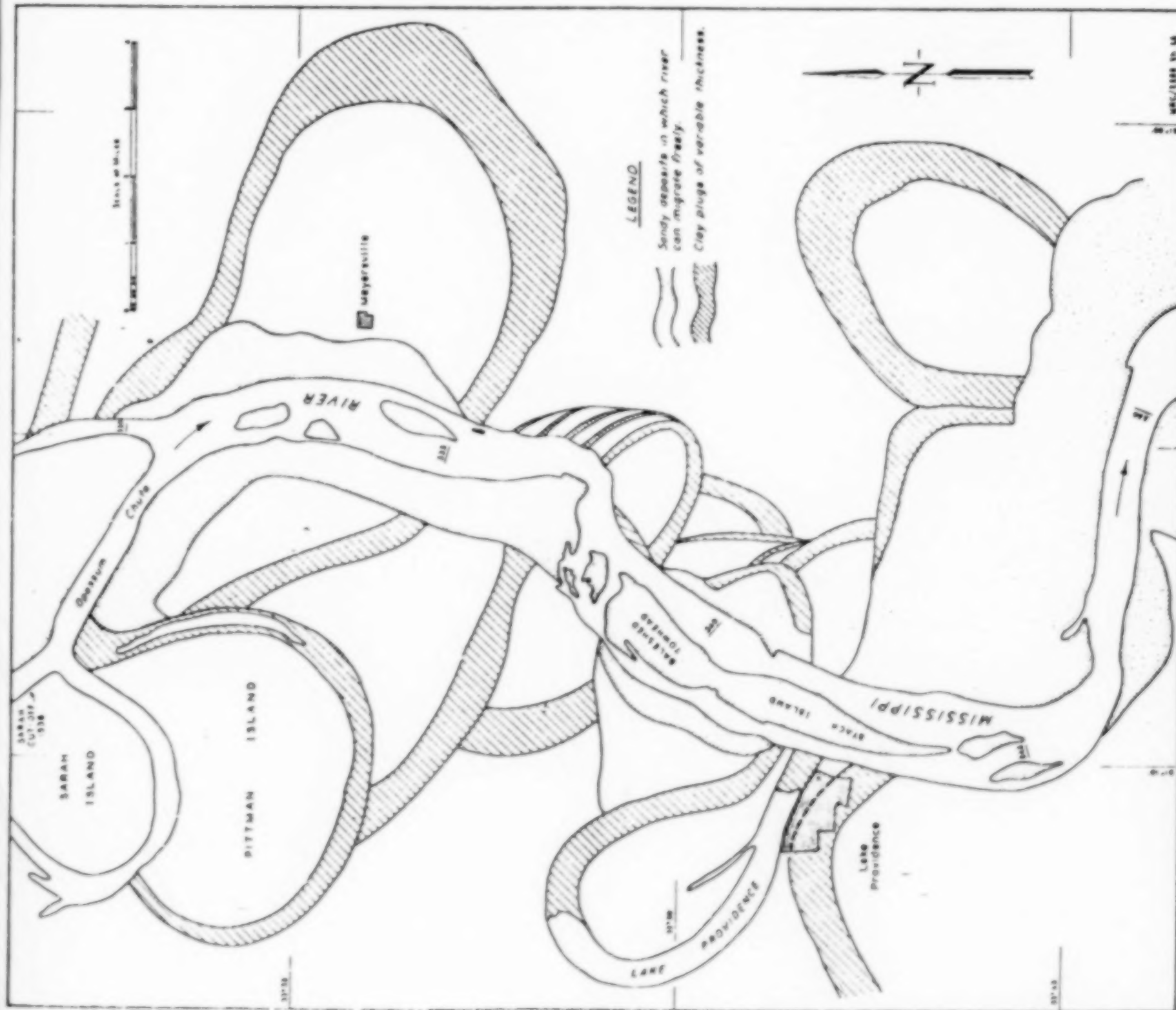
Load. The load of the river varies with stage, slope, and distribution of velocities within the water mass, and with the nature of the bed materials. The principal load of the river, suspended load, has little direct effect upon river activity inasmuch as most of it is in continuous transit to the Gulf. Coarse load is transported mainly as bed load and has a direct effect upon channel cross-section. The stream may become locally overloaded in areas where a large supply of sand is available and it may become "starved" where banks are made up of resistant materials.

There are no measurements to show the quantity of coarse-grained sediments introduced by the tributaries of the Mississippi River. There is, however, no evidence in the nature and distribution of floodplain sediments near the mouths of tributary streams to prove that sands are being introduced by the streams in quantities sufficient to cause local channel aggradation.

The change from a shallow-channel braided stream to a deep-channel meandering stream made it possible for the Mississippi River to scour deeply into coarse

alluvium laid down during early epochs in valley history. These coarse sediments, scoured from the channel or derived from bank caving associated with bend migration, form most of the sand load of the river and are carried but short distances from areas of high-water velocity to areas of low-water velocity where they form bar deposits. The downstream movement of coarse sediments is therefore a slow and discontinuous process termed "trading." The local transfer of sands from caving bank to an adjacent downstream bar halts when the bar is isolated from the river by channel migration or cut-off. The speed of the trading process is dependent upon the speed of channel migration which increases with rise in river stage throughout the valley but decreases downstream as banks become less sandy and the valley slope gentler. Gulfward movement of the coarse sediment is extremely slow, owing to the local and intermittent nature of transfer by trading. Sands are "stored" in bars of the meander belt until subsequent migration of the channel permits reworking of the deposits.

* * *



CONTROL OF RIVER ALIGNMENT BY CLAY PLUGS IN THE LAKE PROVIDENCE REACH OF THE MISSISSIPPI RIVER.

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SEE FOLDOUT NO 9

TABLE NO. 1 EXHIBIT 32F

DESCRIPTION: TABLE OF GEOGRAPHIC COORDI-
NATES OF THALWEG AS OF JANU-
ARY 1988 SURVEY.

STATE'S EXHIBIT LA32F
STACK ISLAND - VICINITY OF
LAKE PROVIDENCE, LA.
GEOGRAPHIC COORDINATES OF THALWEG
JANUARY 1988 SURVEY

Pt. 1 (mile 494AHP)	32° 52' 24."16	91° 05' 10."14
2	32° 52' 06."91	91° 05' 32."40
3	32° 51' 56."24	91° 05' 48."35
4	32° 51' 41."32	91° 06' 11."65
5	32° 51' 26."69	91° 06' 34."95
6	32° 50' 40."88	91° 07' 48."12
7	32° 50' 29."06	91° 08' 04."08
8	32° 50' 16."94	91° 08' 19."03
9	32° 50' 02."42	91° 08' 32."62
10	32° 49' 45."74	91° 08' 43."33
11	32° 49' 25."13	91° 08' 54."02
12	32° 49' 12."36	91° 08' 58."25
13	32° 47' 27."83	91° 09' 28."60
14	32° 47' 04."65	91° 09' 32."22
15	32° 46' 36."63	91° 09' 33."47
16	32° 46' 05."54	91° 09' 32."04
17	32° 45' 40."72	91° 09' 28."66
18	32° 45' 02."57	91° 09' 20."04
19	32° 44' 37."86	91° 09' 10."00
20	32° 44' 12."36	91° 08' 50."10
21	32° 44' 03."16	91° 08' 30."99
22	32° 43' 57."13	91° 08' 05."48

STATE'S EXHIBIT
LA 32 F1
STACK ISLAND - GEOGRAPHIC COORDINATES
1882 FIXED THALWEG

Thalweg fixed in 1882 by U.S. Engineers in closing off
Main Navigation Channel through Stack Island Chute by
constructing Pile Dikes across channel

Pt A	32° 51' 09."06	91° 07' 03."03
B	32° 49' 35."34	91° 07' 39."01
C	32° 49' 23."38	91° 07' 44."47
D	32° 49' 12."81	91° 07' 51."07
E	32° 48' 40."09	91° 08' 30."81
F	32° 48' 32."28	91° 08' 40."89
G	32° 48' 20."52	91° 08' 52."19
H	32° 47' 41."28	91° 09' 24."40

1

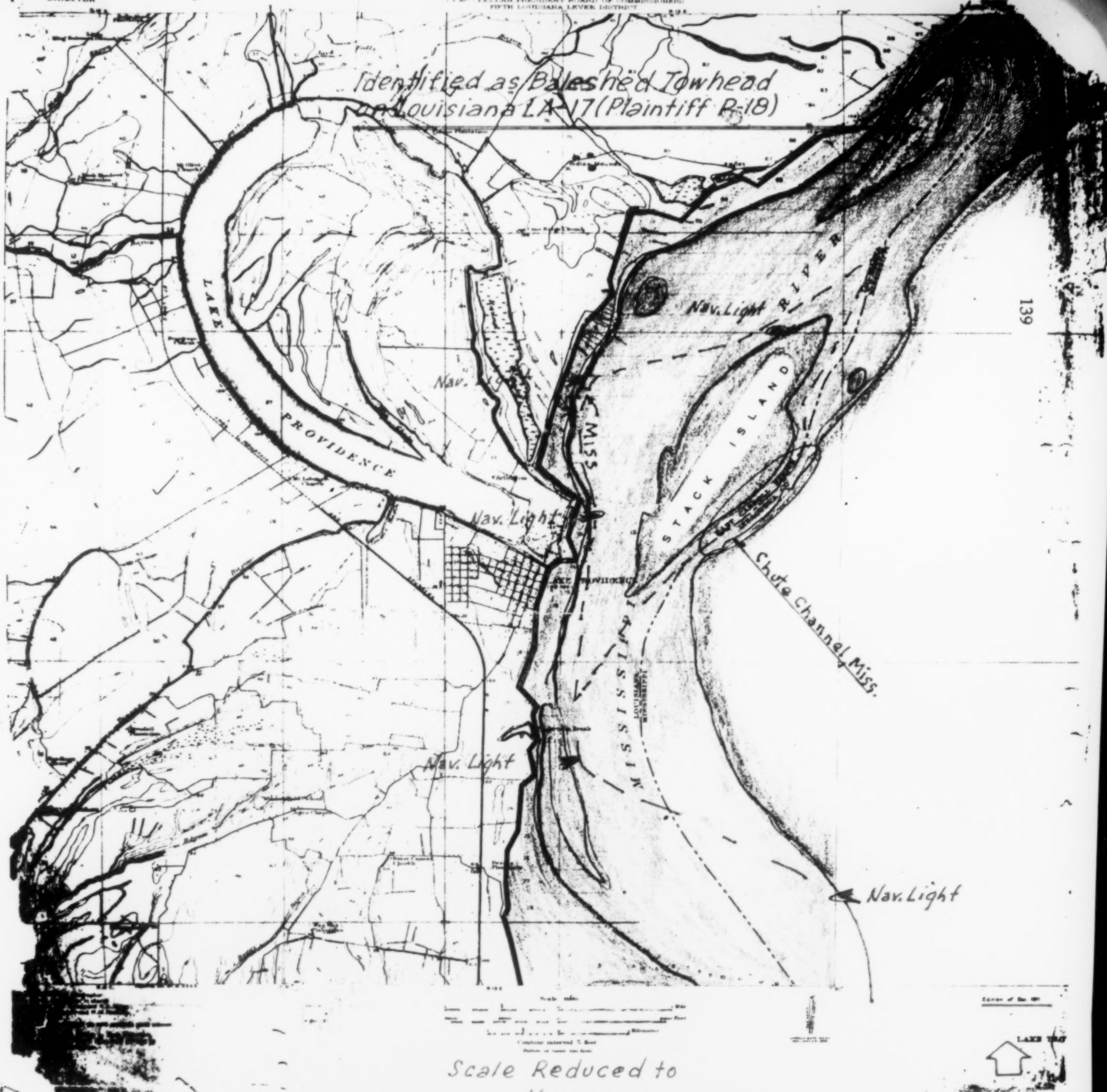


Plaintiff does not show the connection
between Point 1 of claimed boundary
and point of claimed avulsion 1911-1913

Point where the claimed old navigation channel
containing the claimed fixed thalweg boundary
would be intercepted by the new navigation
channel in the period 1911-1913 when Plaintiff
claims an avulsion occurred "at Stack Island"
(Pg. 2 of Judgment July 3, 1989. See P-18

All of Plaintiff's exhibits P-18 (1913), P-19 (1925),
P-20 (1930) show that Plaintiff extends the
claimed old channel containing the claimed
fixed thalweg boundary downstream on the
right thalweg (Along the Hagaman Revetment
1913-1930 and along the later re-
located relocated Stack Island Revetment
Exhibit P-21, 1930)

Identified as Baleshed Towhead
and Louisiana LA-17 (Plaintiff P-18)

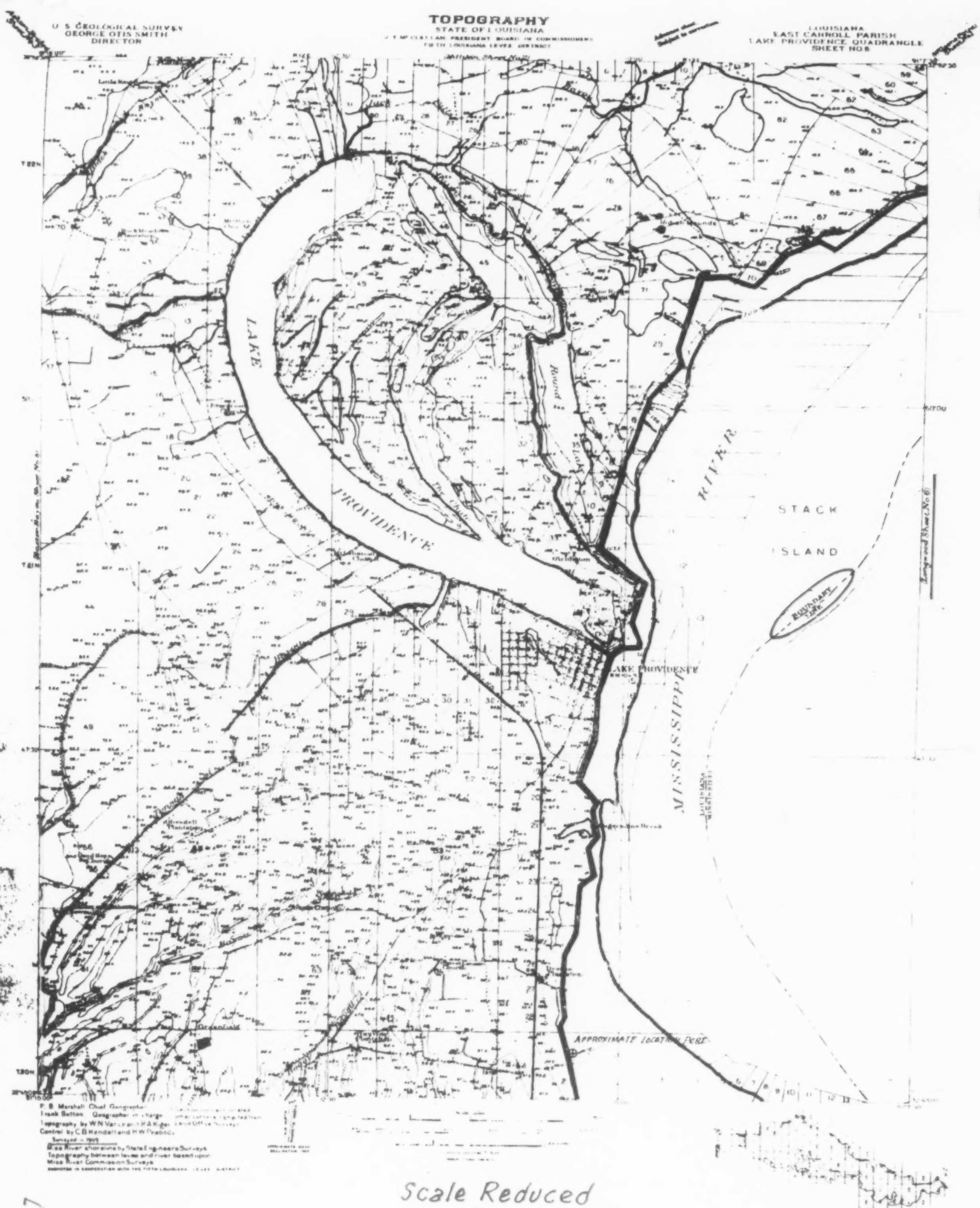


LOUISIANA-MISSISSIPPI BOUNDARY 1911

LA-16 showing river between banks and islands therein
from Mississippi River Commission survey of November 1908
(Plaintiff Exhibit P-17).

Within the banks of the river the topography, including Stack
Island, is identical to that shown on Plaintiff P-17 Shoreline
Survey of Nov. 1908 by Mississippi River Commission

DESCRIPTIVE MATERIAL IN COLOR ADDED TO BASE MAP LA-16

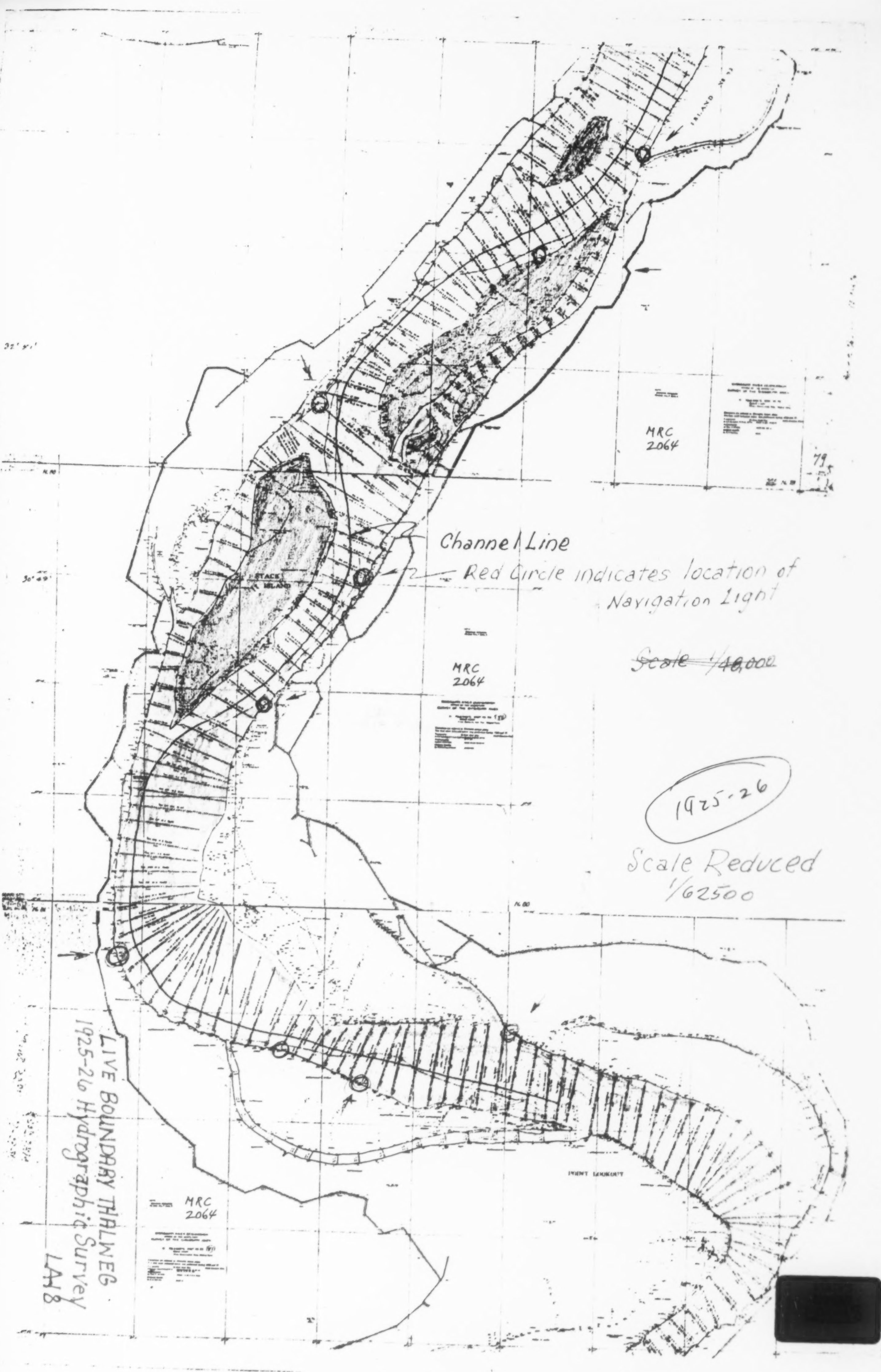


140

LOUISIANA EXHIBIT LA-16A
1909 EDITION
DESCRIPTIVE NOTES ADDED IN RED
TO BASE MAP LA-16A

Louisiana-Mississippi Boundary 1909

Within the banks of the river the topography, including Stack Island, is identical to that shown on Plaintiff P-17 Shoreline Survey of Nov. 1908 by Mississippi River Commission.



Channel Line

Red Circle indicates location of Navigation Light

Scale 1/40,000

1925-26

Scale Reduced 1/62500

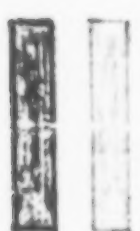
MRC 2064

MRC 2064

LIVE BOUNDARY THALWEG
1925-26 Hydrographic Survey
LAH8

32° 47'

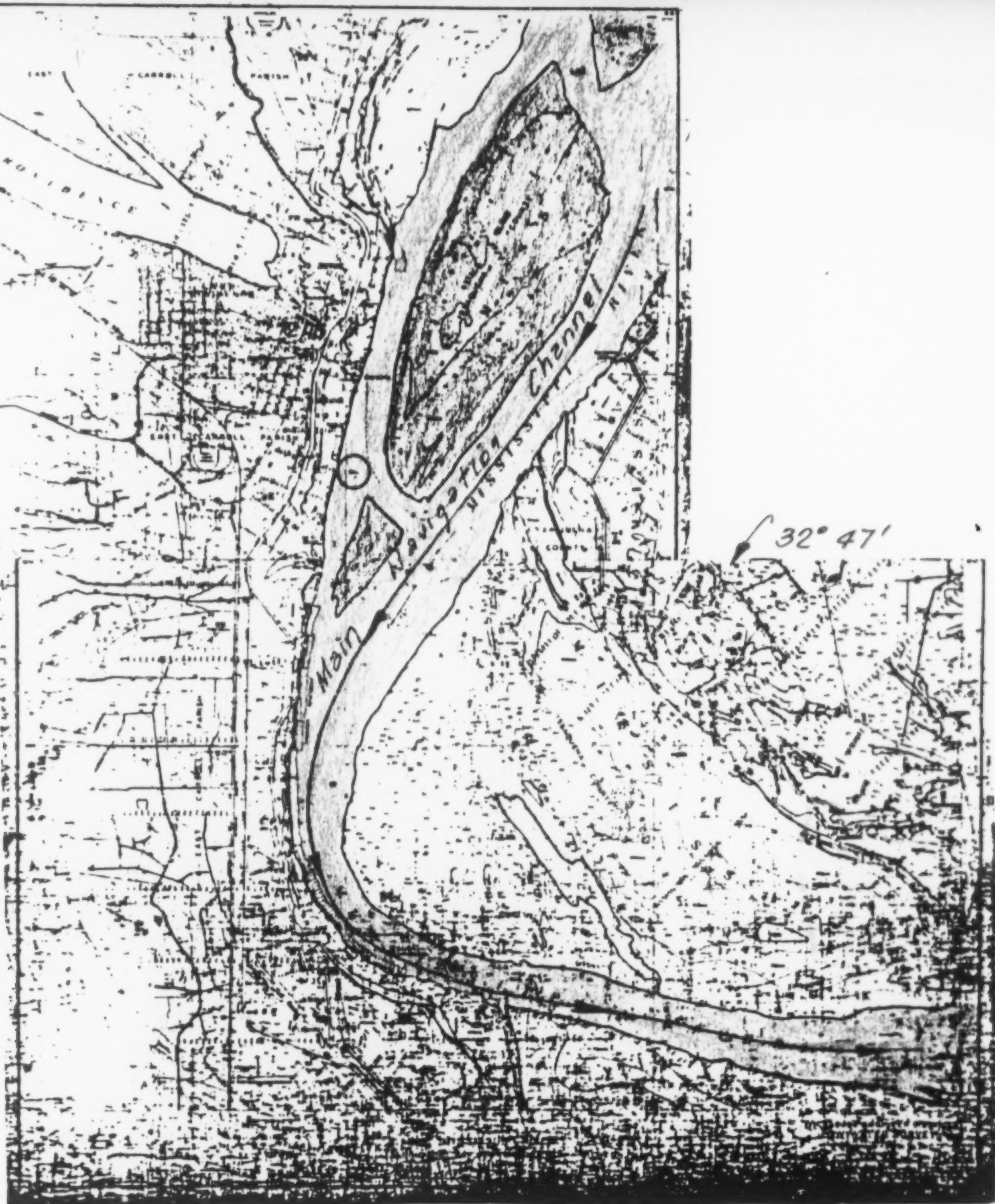
32° 47'



LEGEND

Bed of river at stage surveyed
Islands in river

Coloring and main navigation channel
superimposed



CONFLUENCE BAR ACCRETION

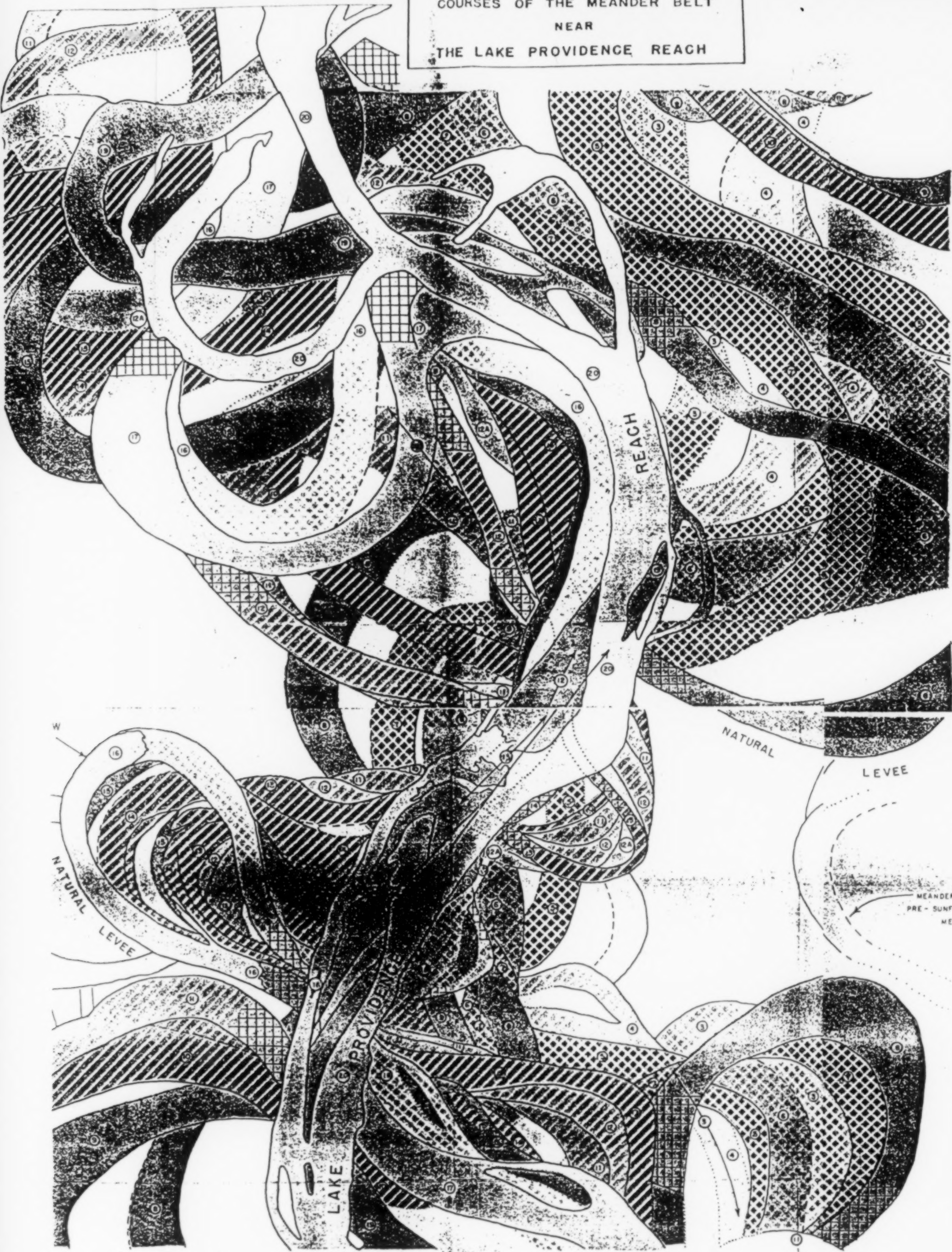
The land mass or island immediately south of Stack Island, claimed by Plaintiff to be "confluence bar accretion" (Paragraph 3 of Judgment of July 3, 1989) was formed in the State of Louisiana west of the boundary thalweg. This land mass formed independent of Stack Island and was separated from it by the main ferry channel. Later, this separate island attached to Stack Island and cannot be considered accretion to Stack Island.

Scale Reduced
1/42500

LA-19 (P-20)

1930 Low Water Survey
Showing Island below Stack Island

PLATE XV
COURSES OF THE MEANDER BELT
NEAR
THE LAKE PROVIDENCE REACH



COURSES

20	(1940)
19	(1881-93)
17	(1765)
16	
15	
14	
13	
12	
11	
10	
9	
8	
7	
6	
5	
4	
3	
2	
1	

○ NATURAL CUT-OFF OF RIVER FOLLOWING COURSE NO. SHOWN IN CIRCLE

CLAY PLUG

174

HISTORIC BANK LINES & OLDER BANK LINES OF WHICH TRACES ARE STILL PRESERVED

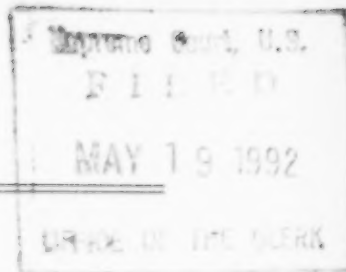
FROM TRACES OF THE OPPOSITE BANK LINE

INFERRED BANK LINES



La 32H

7
No. 91-1158



In The
Supreme Court of the United States
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONERS

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Counsel for Petitioners

May 19, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in determining the boundary between the States of Mississippi and Louisiana.
2. Whether the court below exceeded its authority under Rule 52(a) in disregarding findings of fact by the trial court as "clearly erroneous."
3. Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi?¹

¹ As stated by this Court in its order granting certiorari.

PARTIES TO THE PROCEEDING BELOW

The State of Mississippi

Julia Donelson Houston (now Ehrhardt), Ruth Houston Baker, and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased

Ruth Houston Baker, Individually

The State of Louisiana

The Lake Providence Port Commission

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OPINIONS BELOW

The opinion of the court below is reported as *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), and is reproduced in the Appendix to the Petition for Writ of Certiorari at 1a.¹ The trial court issued unreported bench opinions on June 23, 1989 and October 2, 1989. (Pet. for Cert. App. 19a and 50a)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). (Pet. for Cert. App. 18a) The judgment of the court below was entered on August 5, 1991. (Pet. for Cert. App. 1a) Rehearing was denied on October 22, 1991. (Pet. for Cert. App. 16a) A timely petition for certiorari was filed on January 16, 1992, and this Court granted certiorari on March 23, 1992.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1251(a) (1988) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States") and 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

¹ The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App. ____." The Joint Appendix filed with this Brief on the Merits is cited as "J.A. ____."

STATEMENT OF THE CASE

This case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the Mississippi River known as "Stack Island" or "Island No. 94," together with the rights of individual owners claiming title under patent from the United States and a deed from the State of Mississippi.

The island has been known to exist, or appears from evidence in the record to have existed, since the 1826-1827 era. The Houston group² claims under a homestead patent from the United States issued to Stephen B. Blackwell in 1888,³ effective 1881, and a deed from the State of Mississippi issued in 1933 following a tax foreclosure. (Pl.Ex. 46; Tr. 201, 218)⁴

This case was originally brought by the Houston group in the United States District Court for the Southern District of Mississippi ("Mississippi district court" or "trial court") as a complaint to remove cloud. Louisiana sought leave to intervene as a matter of right under Rule 24 of the Federal Rules of Civil Procedure, asserting that the Mississippi district court had jurisdiction, that Stack Island was located in Louisiana, and that the island was

² These are the individual landowners who were parties to the proceeding below. See *supra* at ii.

³ The patent describes the land as being in Issaquena County, Mississippi (Pl.Ex. 41; Tr. 200, 218) as does the homestead application book. See entry dated October 25, 1881. (Pl.Ex. 40; Tr. 199, 218)

⁴ Record references to the trial transcript are designated "Tr. ____" herein.

owned by Louisiana or by the Lake Providence Port Commission. (J.A. 5-8)

Following its intervention, Louisiana filed a third-party complaint against the State of Mississippi seeking a determination of the proper boundary between the States of Louisiana and Mississippi and a declaration of rights and title to Stack Island arising out of an Act of Congress approved April 6, 1812, 50 Stat. 701, admitting Louisiana as a state. (J.A. 22) Jurisdiction was asserted primarily on the ground that the controversy involved the interpretation and application of federal law. (J.A. 23-24) The complaint also alleged the existence of disputes between citizens of different states, between citizens of one state and the state itself, and between the States of Louisiana and Mississippi. (J.A. 23-24)

Mississippi answered, asserting that Stack Island was located in Mississippi pursuant to the Act admitting Mississippi to the Union, as well as the Treaty of Peace between the United States and Great Britain of September 3, 1783, 8 Stat. 80, and maintaining that the property was therefore subject to the exclusive and complete jurisdiction of the State of Mississippi. (J.A. 29)

Louisiana then sought to have this Court assume original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a) (1988). *Louisiana v. Mississippi*, No. 114, October Term 1988. (Pet. for Cert. App. 83a) Mississippi, together with the Houston group, urged this Court not to take jurisdiction because an alternative forum, the Mississippi district court, could determine the issues and the normal review procedure, including certiorari, would be available to any

party dissatisfied with the result.⁵ (Pet. for Cert. App. 86a, 87a)

By order issued October 3, 1988, this Court denied the application for stay of the proceedings in the Mississippi district court. *Louisiana v. Mississippi*, 488 U.S. 808 (1988) (Pet. for Cert. App. 89a). Thereafter, by order dated December 12, 1988, the motion of Louisiana for leave to file a bill of complaint was denied. *Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988) (Pet. for Cert. App. 91a). Rehearing was denied by order of February 27, 1989. 489 U.S. 1050 (1989) (Pet. for Cert. App. 93a).

On the motion of Louisiana, the trial court ordered the cause bifurcated for separate trials, the first trial to determine whether Stack Island was Mississippi land, the second to determine title in the event the trial court determined Stack Island did lie within the State of Mississippi. (J.A. 38-39)

The trial court found, on the extensive record in the first trial, that the boundary thalweg of the Mississippi River lay west of Stack Island in 1881, the date of the patent, and that, accordingly, the island was Mississippi land. The trial court did not refer to the undisputed testimony and documentary evidence in the record locating Stack Island east of the Mississippi River thalweg as early as 1826-1827. See Pet. for Cert. App. at 24a-34a. The trial court also reviewed the evidence of Mississippi's long-exercised dominion and jurisdiction over Stack

⁵ It was also argued that the expenses involved militated in favor of permitting a decision by the Mississippi district court. (Pet. for Cert. App. 86a)

Island and found that Mississippi had established sovereignty by virtue of the Doctrine of Acquiescence. (Pet. for Cert. App. 37a-41a)

Having determined the land to be in Mississippi, the trial court then heard evidence on the question of ownership and ordered that title be quieted in the Houston group. (Pet. for Cert. App. 74a, 75a)

Louisiana appealed. The Fifth Circuit reversed and rendered. It regarded the findings of the district court as clearly erroneous and made findings of its own that Stack Island was within Louisiana. In addition, the Fifth Circuit reviewed *de novo* the trial court's application of the law to the facts concerning acquiescence and found that the trial court's ruling could not be sustained. See 937 F.2d at 253-54. (Pet. for Cert. App. at 71a, 14a)

Requests for rehearing were denied. (Pet. for Cert. App. 16a) Certiorari was granted by this Court on March 23, 1992, on the questions for review set out above.

SUMMARY OF THE ARGUMENT

This case turns on fact-findings made by the trial court with respect to the application of two doctrines, the Rule of the Thalweg, with the Island Rule exception, and the Doctrine of Acquiescence. With the exception of the jurisdiction question, the applicable rules of law are well established by decisions of this Court. Petitioners submit that the trial court had jurisdiction and that its findings control.

Whether Stack Island is located within the boundaries of Mississippi or Louisiana is to be determined by the location of the thalweg, or main downstream navigation channel of the Mississippi River, at the time Louisiana was admitted to the Union or at the time the island was formed. A subsequent change in the location of the thalweg from one side of the island to another, however gradual, does not change the sovereignty of the state over the island. See *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1871). However, the long exercise of dominion by a state over disputed lands, coupled with acquiescence in such dominion, preempts the Thalweg Rule and fixes sovereignty in the state that has asserted the dominion and jurisdiction. *Arkansas v. Tennessee*, 310 U.S. 563 (1940).

By patent effective in 1881, Stack Island was patented by the United States as Issaquena County, Mississippi land. The trial court found from the evidence that at that date the boundary thalweg lay west of Stack Island. It also found, based on an extensive record, that Mississippi had exercised dominion and jurisdiction over the island land mass since 1881, a period of approximately 108 years, and that, in the event the trial court was in error in its application of the Thalweg Rule, the island had become Mississippi land under the Doctrine of Acquiescence. (Pet. for Cert. App. 40a, 41a) These findings should have controlled the outcome of this litigation.

Fact-findings made by the trial court can only be disregarded when such findings are "clearly erroneous." Rule 52(a). Where there are two permissible views of the evidence, whether they be based on testimony of witnesses or documentary evidence, the fact-finder's choice between them cannot be clearly erroneous. *Anderson v.*

City of Bessemer City, 470 U.S. 564 (1985). Nor is any distinction made between ultimate findings and subsidiary findings. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). If the finding is plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it would have made a different finding had it been sitting as the trier of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

The record here fully supports, if not compels, the trial court's findings. However, exceeding the limits of its authority under Rule 52(a), the Fifth Circuit indulged in its own fact-findings with respect to the location of the thalweg in 1881. The Fifth Circuit's opinion discloses and reviews two permissible views of the evidence based on conflicting expert opinions. This itself validates the trial court's finding and precludes a holding that it is "clearly erroneous." By offering factual rather than legal grounds for its reversal, the Fifth Circuit further confirmed that it had exceeded permissible limits in its review. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

The Fifth Circuit also refused to accept the findings of the trial court with respect to the Doctrine of Acquiescence. It erroneously reviewed *de novo* on the stated justification that the trial court had incorrectly applied the facts to the law. Like the thalweg issue, acquiescence *vel non* involves a pure question of fact. *Arkansas v. Tennessee*, 310 U.S. 563 (1940).

The record showed and the trial court found that prescription and acquiescence were established, *inter alia*, by the patenting of Stack Island as Mississippi land in 1881, taxing by Mississippi at least from 1889 (the year

following the issuance of the patent), the enforcement by Mississippi of its tax laws through foreclosure and sale, sale by Mississippi to the predecessors in title of the Houston group, law enforcement by Mississippi officers, the resolution of disputes in Mississippi courts, as well as the general reputation and recognition of the island as Mississippi land by persons familiar with it. The trial court further found that Louisiana had not acted to assert sovereignty or to interrupt Mississippi's longstanding exercise of dominion over the island. The only evidence claimed by Louisiana to show any assertion of jurisdiction – the passage of legislation in 1908 and activities of the Louisiana Levee District – was addressed by the trial court and found not to have been associated with Stack Island. These findings should have been accorded controlling deference.

While the Fifth Circuit could, if required, have remanded to the trial court for further findings, it was beyond its authority to substitute its own fact-findings and, based thereon, to render judgment for Louisiana. Cf. *Icicle Seafoods v. Worthington*, 475 U.S. 709 (1986).

The jurisdiction of the district court to entertain Louisiana's third-party complaint against Mississippi turns on three distinct issues. Although 28 U.S.C. § 1251(a) gives this Court "original and exclusive jurisdiction of all controversies between two or more States," it is now settled here that the Court has discretion about accepting original cases, "even as to actions between States where our jurisdiction is exclusive." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 798 (1992).

In exercising its discretion whether to hear an original case, the Court considers whether the issues are clearly subject to resolution in an alternative forum. *Wyoming*, 112 S. Ct. at 798-99. Here the Court exercised its discretion and denied Louisiana's motion to file a bill of complaint in the Court's original jurisdiction. *Louisiana v. Mississippi*, 488 U.S. 808 (1988). That the Court in 1988 regarded the pending action in the Southern District of Mississippi as a suitable alternative forum does not establish that the district court had jurisdiction, but the Court was right in thinking that the district court had jurisdiction and could resolve the issues.

The jurisdiction of the district court over the original suit between private parties has never been questioned. The trial court properly allowed Louisiana to intervene in that suit on either of two bases. Louisiana asserted that its complaint in intervention raised a federal question, and it was right. A claim by a state about where its boundary is, like a possessory action by an Indian tribe, *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974), must always be a matter of federal law. State boundaries are determined by Acts of Congress, by treaties to which the United States is a party, or by federal common law. Even if this were not so clearly a case of federal-question jurisdiction, Louisiana's claim in intervention would come within the ancillary jurisdiction of the district court, since the intervention was of right under Rule 24(a)(2). After Louisiana was allowed to intervene, it was properly granted leave to assert a third-party claim against Mississippi. The third-party claim raised

the same federal questions as did the claim in intervention, and a third-party claim is always within the ancillary jurisdiction of the court.

That the Fifth Circuit found that the land in question is in Louisiana does not affect the jurisdiction of the district court in Mississippi to hear the case. It is not the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it. *Durfee v. Duke*, 375 U.S. 106 (1963), established a "rule of jurisdictional finality" and explicitly refused to recognize an exception to that rule for cases involving real property over which the state claims exclusive jurisdiction. Under *Durfee*, once the location of land has been fully litigated and judicially determined, it cannot be retried in another state in litigation between the same parties.

The Mississippi district court had jurisdiction. Its fact-findings are fully supported by record evidence, and those findings control the decision here.

ARGUMENT

I. THE COURT BELOW MISAPPLIED THE RULE OF THE THALWEG AND THE DOCTRINE OF ACQUIESCENCE

The Rule of the Thalweg holds that the thalweg, or center of the main downstream navigation channel, locates the boundary between states bordering navigable waters. The boundary is established on the date the state

is admitted to the Union.⁶ It may shift with gradual changes in the location of the channel but does not shift with avulsive, sudden, or violent changes. *Iowa v. Illinois*, 147 U.S. 1 (1893); *Louisiana v. Mississippi*, 466 U.S. 96, 100-101 (1984); *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 401 (1871); *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Kansas v. Missouri*, 322 U.S. 219 (1944); *Louisiana v. Mississippi*, 466 U.S. 96.

The Island Rule, applicable here, represents an exception to the Rule of the Thalweg. Under the Island Rule, an island, once within the confines of a state's boundaries, remains a part of the state's territory irrespective of subsequent gradual changes in the location of the thalweg. In *Missouri v. Kentucky*, this Court stated:

The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis [the location of the thalweg], as were those of Arkansas in 1836, 3 Stat. at L., 545; 5 Stat. at L. p. 50. And Kentucky succeeded in 1792 (1 Stat. at L., 189) to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island

⁶ Louisiana was admitted in 1812. Mississippi was admitted in 1817.

does not, in consequence of this action of the water, change its owner.

78 U.S. at 401.⁷

A. The Fifth Circuit's Error in Applying The Thalweg Rule

The uncontradicted evidence submitted at trial by Mississippi established that Stack Island was known to exist as early as the 1826-27 era. It is clearly shown on Plaintiff's Exhibit 1, a United States survey map of Township 11 North, Range 9 West, Issaquena County, Mississippi. (Pl.Ex. 1; Tr. 286, 286; J.A. 127) The survey map identifies the island and depicts its location east of the boundary channel (separated from the Mississippi mainland by a narrow chute) and within the jurisdiction of the State of Mississippi. No island is shown in the river on the Louisiana side of the boundary channel on the corresponding United States survey map of Township XXI, Range XIII East, now a part of East Carroll Parish, Louisiana. (Pl.Ex. 2; Tr. 287, 287; J.A. 128) Subsequent evidence of the location of Stack Island with respect to the channel exists in an 1867 map of the eastern shore of the Mississippi River (Pl.Ex. 3; Tr. 293, 293; J.A. 129), a map entitled, "Reconnaissance of the Mississippi River in 1874, made pursuant to an 1874 Act of the United States Congress" (Pl.Ex. 4; Tr. 295, 295; J.A. 130), and an 1879 map made as a blueprint of the plan for the Mississippi River Commission to narrow the channel of the river. (Pl.Ex. 5; Tr. 299,

⁷ The Fifth Circuit recognized the Island Rule. 937 F.2d at 250. (Pet. for Cert. App. 6a)

299; J.A. 131) These documents identify Stack Island, or Island No. 94, as land in place lying east of the main navigation channel and separated from the Mississippi mainland by a narrow chute channel. Mississippi's expert witness Smith carefully evaluated these and other materials and concluded that Stack Island had been an identifiable land mass in the Mississippi River located on the east side of the main navigation channel, or thalweg, and thus within the State of Mississippi since the 1826-1827 era. (J.A. 88-100)

Louisiana offered no evidence for the purpose of contradicting either the facts reflected in the early maps and surveys or the conclusion drawn by Mississippi's expert witness from those maps and surveys with respect to the location of the thalweg and Stack Island prior to the effective date of the United States patent in 1881.

It is apparent from a review of the trial court's bench opinion, its findings and conclusions, and the Fifth Circuit's opinion that the focus of both courts was on the location of the thalweg in relation to Stack Island at the time of the 1881 survey.⁸

The trial court analyzed the evidence and the conflicting testimony of the expert witnesses for Louisiana and Mississippi drawn from reports generated from and after the 1881 survey. Mississippi contended, in essence, that the boundary thalweg at the time of the reports, 1882

⁸ While at one point in his bench opinion the trial court refers to the thalweg as "always" having been located west of Stack Island (Pet. for Cert. App. 40a), this finding clearly appears to have been made in the context of the court's attention to the 1881 survey date.

and 1883, was west of Stack Island. Louisiana's contrary interpretation was likewise considered and discussed in the trial court's bench opinion. The trial court found that the weight of the evidence favored Mississippi's position. (Pet. for Cert. App. 24a-31a) The court noted that certain of the evidence indicated that the river was "trying to switch its course into the east chute," during the period under review, but found that, as of the date of the 1881 survey, the boundary thalweg lay west of Stack Island and that Stack Island was Mississippi land. (Pet. for Cert. App. 30a) The factual conclusions urged by Louisiana's experts were rejected. (Pet. for Cert. App. 32a, 33a) Stating that it "accepts the logic of [Mississippi's expert] Mr. Smith," the trial court found the boundary thalweg between Mississippi and Louisiana to have been located west of Stack Island in 1881.

The Court, accordingly, rules that as of the date of the survey [August, 1881] the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island.

(Pet. for Cert. App. 28a, 30a)

The trial court also examined evidence regarding the subsequent change in the main channel as a result of avulsive action, concluding correctly that avulsive changes in the boundary thalweg did not change state boundaries. (Pet. for Cert. App. 31a) It specifically found that Island No. 94, Stack Island, is the same land mass depicted on the 1881 survey.

The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, La.-21, 27, and 29, that there has always been a land mass from 1881 to

the present time which by map can be traced from the original Stack Island.

(Pet. for Cert. App. 32a) The court followed with the finding that

[the] land mass which now lies against the Louisiana bank and which is the portion claimed by the Plaintiffs is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretion less erosion.

(Pet. for Cert. App. 33a)

Finally, the trial court found that the flow on the west of Stack Island ceased in 1954 and the boundary became fixed at that time. (Pet. for Cert. App. 34a, 48a-49a, 76a, 77a) See also *Arkansas v. Tennessee*, 246 U.S. 158, 175-77 (1918).

In order to determine whether Stack Island was within the territorial limits of Mississippi or Louisiana, it appears, under the decisions of this Court, to be necessary to determine where the island was located when Louisiana was admitted to the Union or at the time the island was formed. See *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1871); *Mississippi v. Arkansas*, 415 U.S. 289 (1974); *Kansas v. Missouri*, 322 U.S. 213, 229 (1944); *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890). However, no express findings were made with regard to the location of the boundary thalweg at that time. While the Fifth Circuit rejected the trial court's findings of fact, it likewise addressed only evidence with respect to the location of the thalweg from and after 1881. The obvious problem is that at this date it is impossible, except perhaps in legal contemplation, to fix the location of the thalweg or the existence of the

island in 1812. The earliest available documents locating the thalweg in relation to Stack Island were generated 16 to 17 years later. It is not clear under the circumstances, considering the specific and detailed nature of the trial court's findings in its bench opinion, whether an implied finding of fact can be indulged with respect to the existence and location of Stack Island prior to 1881 or whether a presumption of location can be made from the undisputed early documentary evidence. It is reasonable to do so. In any event, the trial court elected not to follow this course.

What is clear, however, is that the Fifth Circuit could not itself supply such a finding and that its independent analysis of the record and resulting determination of the thalweg's location in 1881 exceeded its authority under Rule 52(a). The Fifth Circuit's rendition of judgment in favor of Louisiana, having been based upon a finding that it was not authorized to make of a location at an irrelevant date, must be reversed.

Louisiana, as the third-party complainant, had the burden of proof. Cf. *Kansas v. Missouri*, 322 U.S. 213 (1944):

Both by virtue of her position as complainant and on the facts, Kansas has the burden of proof in this case.

322 U.S. at 228. Louisiana offered no evidence of the location of Stack Island at the time Louisiana was admitted to the Union. Further, Mississippi's uncontradicted documentary evidence, generated from 1826 forward, showing Stack Island as lying east of the boundary thalweg raises at least a prima facie case of the existence and

location of the island in 1812. Louisiana did not undertake to controvert or otherwise dispute this evidence and thus failed to sustain its burden of rebutting Mississippi's prima facie case. Cf. *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974) (Arkansas failed to sustain its burden of rebutting Mississippi's prima facie case).

If a specific finding of the location of the thalweg at the time of Louisiana's admission to the Union or whenever Stack Island was formed is required, a remand to the district court would be appropriate to close the gap. See *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943). In view of the trial court's specific and conclusive findings regarding prescription and acquiescence and the extensive record support for such findings, as well as Louisiana's failure to meet its burden of proof, no such remand is required, however.

B. The Fifth Circuit's Error in Disregarding the Trial Court's Findings of Acquiescence.

The Doctrine of Acquiescence fixes state boundaries as a result of acts of state dominion, control, and sovereignty over land, coupled with the failure of the adjoining state to assert claims of right or jurisdiction. *Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Louisiana v. Mississippi*, 202 U.S. 1 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893); *Indiana v. Kentucky*, 136 U.S. 479 (1890). When applicable, it supersedes the Rule of the Thalweg.

In *Arkansas v. Tennessee*, 310 U.S. 563 (1940), this Court, quoting from the earlier case of *Rhode Island v.*

Massachusetts, 45 U.S. (4 How.) 591, 639 (1846), explained the doctrine in the following way:

"For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." Applying this principle in *Indiana v. Kentucky*, 136 U.S. 479, 510, to the long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the land there in controversy, the Court said: "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." Again, in *Louisiana v. Mississippi*, 202 U.S. 1, 53, the Court observed: "The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect to the acquisition by prescription of large tracts of country claimed by both."

310 U.S. at 569.

Rejecting the contention that the Rule of the Thalweg preempts the Doctrine of Acquiescence, this Court stated:

On behalf of Arkansas it is argued that the rule of the *thalweg* is of such dominating character that it meets and overthrows the defense of prescription and acquiescence. That position is untenable. The rule of the *thalweg* rests upon equitable considerations and is intended to safeguard to each State equality of access and right

of navigation in the stream. *Iowa v. Illinois*, 147 U.S. 1, 7, 8; *Minnesota v. Wisconsin*, 252 U.S. 273, 281, 282; *Wisconsin v. Michigan*, 295 U.S. 455, 461; *New Jersey v. Delaware*, 291 U.S. 361, 380. The rule yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of prescription, the boundary no longer follows the *thalweg* but remains at the original line although now on dry land because the old channel has filled up. *Nebraska v. Iowa*, 143 U.S. 359, 367; *Missouri v. Nebraska*, 196 U.S. 23, 36; *Arkansas v. Tennessee*, *supra*, pp. 173, 174. And, in turn, the doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. Here that fact has been established and the original rule of the *thalweg* no longer applies.

310 U.S. at 571.

The trial court, having first found that Stack Island was located in Mississippi under the Rule of the Thalweg, made express findings with respect to the Doctrine of Acquiescence to secure its ultimate ruling. (Pet. for Cert. App. 37a) The court found on the ultimate issue that Mississippi had established sovereignty by the Doctrine of Acquiescence and made subsidiary findings, *inter alia*: (1) that since 1889, the year following the issuance of the Blackwell patent, taxes had been paid on the island to Issaquena County, Mississippi; (2) that Issaquena County officials had claimed jurisdiction over the island for criminal purposes; (3) that Louisiana officials did not attempt to exercise jurisdiction over the island but, rather, referred enforcement matters to Mississippi officials (Pet. for Cert. App. 38a); and (4) that Mississippi's exercise of

dominion and jurisdiction spanned a period of approximately 108 years:

In fact the period of exclusive jurisdiction by the State of Mississippi has run from 1881 to the present time.

(Pet. for Cert. App. 40a)

Louisiana's claim of jurisdiction over the lands in question prior to its intervention related primarily to legislation enacted by it in 1908 and alleged acts of the Fifth Louisiana Levee District during the period from 1907 through approximately 1911. The trial court examined this evidence in detail and found that neither the statute nor related maps and documentary material offered by Louisiana referred to Stack Island and that Louisiana had not asserted jurisdiction during this period. (Pet. for Cert. App. 40a)

The trial court concluded its discussion of the evidence and summarized its findings as follows:

The Court, accordingly, concludes from a preponderance of the evidence that even if it is wrong in concluding that the boundary thalweg lay always to the west of Stack Island and, accordingly, that Stack Island was in fact in Louisiana at some time, that Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by the State of Mississippi and that it is now in the State of Mississippi.

(Pet. for Cert. App. 40a)

On appeal, the Fifth Circuit concluded that the trial court had erroneously applied the law to its fact-findings and reviewed the issue *de novo*. Selectively discussing portions of the evidence, the Fifth Circuit held that the

Doctrine of Acquiescence was inapplicable. This was error. The record overwhelmingly supports the trial court's finding of acquiescence, both as a matter of fact and law.

This Court has identified a number of facts relevant to the determination of prescription and acquiescence.

It has treated patents issued by the United States showing property to be in a particular state as probative of acquiescence. *Louisiana v. Mississippi*, 202 U.S. 1, 55-56 (1906). Stack Island was patented as land located in Issaquena County, Mississippi. (Pl.Ex. 41; Tr. 200, 218) It may reasonably be implied from these facts that the patentee regarded the land as being located in Mississippi and so treated it in his application. Nothing in the record indicates that Louisiana has taken any action to contest this patent or itself to issue any patent, deed, lease, permit, or other authorization suggesting that it sought to exercise dominion over the island at any time. See Pet. for Cert. App. at 40a.

The assessment and payment of taxes over a long period of time have been held relevant to the determination. *Arkansas v. Tennessee*, 310 U.S. at 567-68; *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Louisiana v. Mississippi*, 202 U.S. at 55; *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893). The record evidence established conclusively that, at least as early as 1889, the year following the Blackwell patent, and continuously thereafter, taxes have been assessed by and paid to Issaquena County, Mississippi. (Pl.Ex. 64; Tr. 211-13, 218; J.A. 75) It is further shown that Mississippi enforced its tax assessment in 1929 through foreclosure and by thereafter deeding the

island to the predecessor of the Houston group. (Pl.Ex. 46; Tr. 201, 218) In contrast, there is no evidence in the record of any taxes being assessed with respect to Stack Island by Louisiana or any of its political subdivisions. The Fifth Circuit's comment that there is some evidence that both states claimed the disputed lands as a tax base (Pet. for Cert. App. 14a) is apparently based on the argument of Louisiana.

Court actions concerning the land in which the state has exercised jurisdiction have likewise been viewed as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 518-19. Here, both Mississippi state and federal courts have exercised jurisdiction over controversies involving the island. (Pet. for Cert. App. 21a, 52a) See, e.g., *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir.), *reh'g denied with opinion*, 580 F.2d 815 (1978), *appeal after remand*, 652 F.2d 467 (1981).⁹ There is no evidence of any Louisiana court

⁹ It is not contended that Louisiana is bound by the Fifth Circuit's decision in *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978). The decision, however, is evidence of the general recognition of the island as Mississippi land, as well as an example of the exercise of jurisdiction by Mississippi courts. The payment of taxes to Mississippi authorities over a long period of time is specifically mentioned. 569 F.2d at 885. The opinion in that case provides a touch of irony worth noting: "We begin with 'Stack Island' in the Mississippi River, so identified in the original 1826 United States Land Survey (platted as 'Island No. 94' by the government in 1881)." 569 F.2d at 881 (emphasis added). Specifically addressing the issue here, the Fifth Circuit observed, "An avulsion does not change the boundary. Hence, all the territory involved in this controversy is in

(Continued on following page)

having at any time undertaken to exercise any jurisdiction over the island.

Township surveys prepared by the United States General Land Office have been given emphasis. *Indiana v. Kentucky*, 136 U.S. 479, 512-14 (1890); *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1908). Such surveys in the record here show Stack Island as Mississippi land. (Pl.Ex. 1; Tr. 286, 286; J.A. 127) No township surveys indicate that Stack Island was at any time regarded as part of Louisiana. The 1828 and 1829 United States survey map showing what is now East Carroll Parish, Louisiana, does not show Stack Island, while that portion of the survey directly across the river shows Stack Island as Mississippi land. (Pl.Ex. 2; Tr. 287, 287; J.A. 128)

Grants by the state to individuals have likewise been treated as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 516-18; *Louisiana v. Mississippi*, 202 U.S. at 52-53. Mississippi deeded Stack Island to the predecessor of the Houston group in 1933 following its tax foreclosure. (Pl.Ex. 46; Tr. 201, 218) The record contains no conveyance of any other right or interest by Louisiana or any of its political subdivisions.

Additionally, acts and recognitions of state officials and individuals that tend to show in which state the land is located have been regarded as indicative of the exercise of sovereignty. *Kansas v. Missouri*, 322 U.S. at 402-05;

(Continued from previous page)

Issaquena County, Mississippi, even though Stack Island is now west of the main channel of the Mississippi River." 569 F.2d 881, n.2 (emphasis added).

Louisiana v. Mississippi, 202 U.S. at 56; *Arkansas v. Tennessee*, 310 U.S. at 565-68; *Oklahoma v. Texas*, 260 U.S. 606 (1923). The trial court identified these acts at length. (Pet. for Cert. App. 37a, 38a) It found, *inter alia*, that Issaquena County, Mississippi, officials have asserted criminal jurisdiction, that persons charged with game violations have been delivered by Louisiana officials to Mississippi officials for prosecution (Pet. for Cert. App. 38a; see also J.A. 78-87), that Louisiana State Police, in carrying out reconnaissance operations for marijuana patches on Stack Island, did not attempt to exercise jurisdiction but, rather, notified the Mississippi Bureau of Narcotics of such findings and left it to Mississippi to issue appropriate search warrants and take enforcement action (J.A. 84), that Louisiana authorities, having arrested suspects on the island, turned such suspects over to Mississippi Bureau of Narcotics agents and that such parties were prosecuted in Mississippi by Mississippi officials (Pl.Ex. 65; Tr. 213-15, 218; Pet. for Cert. App. 38a), and generally that Louisiana officials declined to exercise jurisdiction on the island. (J.A. 78, 82-84, 86)

Private citizens familiar with Stack Island for many years testified to the effect that it had always been treated as Mississippi land and assumed to be Mississippi land. (J.A. 78, 81, 82, 85)¹⁰

¹⁰ The Fifth Circuit gently denigrates this evidence as the testimony of a "colorful assortment of Mississippi citizens." 937 F.2d at 253. (Pet. for Cert. App. 13a) It is, however, precisely the type of testimony considered in *Kansas v. Missouri*, 322 U.S. at 220-27. See also *Arkansas v. Tennessee*, 310 U.S. at 567; *Oklahoma v. Texas*, 260 U.S. 606, 635-36 (1923).

Rather than looking at the record as a whole, the Fifth Circuit simply identified what it referred to as a few "isolated incidents" of recognition of Mississippi jurisdiction and concluded that such incidents were insufficient to constitute "long, continuing and uninterrupted assertion of dominion and jurisdiction over an area." 937 F.2d at 253 (Pet. for Cert. App. 14a) (citing *Arkansas v. Tennessee*, 310 U.S. at 571). The Fifth Circuit did not recognize or otherwise address the other relevant facts of acquiescence identified by the authorities cited above and established by the record.

While the Fifth Circuit might have reached, and in fact did reach, a different conclusion in its interpretation of the record evidence, it was not entitled to substitute its findings for those of the trial court nor did it purport to do so. Rather, it stated that it accepted the trial court's findings with respect to acquiescence, concluding only, but erroneously, that the trial court misapplied the law to the facts.

The Fifth Circuit's treatment of the facts is not consistent with the record, and its treatment of the law and relevant inquiries relating to the Doctrine of Acquiescence are contrary to the decisions of this Court. Viewed in its entirety, the record establishes both through oral testimony and documentary evidence that Stack Island has been regarded as Mississippi land since 1826-1827, that Mississippi has exercised jurisdiction and sovereignty over it, and that at no time since its existence was first shown by evidence generated more than a century and a half ago has Louisiana undertaken to challenge or

break that exercise of sovereignty. In light of this evidence and the factual nature of the determination of prescription and acquiescence, the Fifth Circuit erred in reviewing the trial court's findings *de novo* and in determining the acquiescence issue in favor of Louisiana.

II. THE COURT BELOW EXCEEDED THE PROPER SCOPE OF REVIEW UNDER RULE 52(a)

The location of the boundary thalweg in relation to Stack Island and the determination whether the Doctrine of Acquiescence is applicable are matters that implicate purely factual determinations. See *Kansas v. Missouri*, 322 U.S. at 220-27; *Arkansas v. Tennessee*, 310 U.S. at 567 (the exercise of jurisdiction and dominion and acquiescence characterized as "that question of fact").

In its bench opinion of June 23, 1989, the trial court reviewed and analyzed the record evidence and, as required by Rule 52, made extensive findings of fact with respect to both issues. The Fifth Circuit treated the trial court's findings with respect to the location of the thalweg as "clearly erroneous." It finessed the findings with respect to the prescription and acquiescence issue, holding that the trial court had misapplied the law to the fact-finders and thus it was entitled to review *de novo*. 937 F.2d at 253-54. (Pet. for Cert. App. 14a)

Under the caption "Wading In: Two Tales of One River," the Fifth Circuit began its analysis thusly: "We begin our voyage down the river with a review of the factual bases for each party's ownership claim. Their tales are so divergent that each will be separately recounted." 937 F.2d at 249. (Pet. for Cert. App. 3a) The court then, as

it suggests it will, selects the "tale" it regards as the more plausible. In doing so, it wades in more deeply than Rule 52(a) allows.

Rule 52(a) provides that findings of fact "shall not be set aside unless clearly erroneous." The Fifth Circuit purported to resolve this factual dispute "against the backdrop of the clearly erroneous standard," 937 F.2d at 251 (Pet. for Cert. App. 7a), but it misunderstood that standard. Two paragraphs after the statement about "backdrop" the Fifth Circuit said:

Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence, we are "left with the clear impression that an error has been made." *Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967).

937 F.2d at 251. (Pet. for Cert. App. 8a)

A decision that relies on a 1967 precedent to measure the reach of Rule 52(a) in 1991 is inherently suspect. Much has happened in the last quarter-century to clarify the scope of appellate review in nonjury cases. Rule 52 itself was amended in 1985, and there have been important decisions from this Court. In particular, it is now clear that the appellate court's belief that it would have weighed the evidence differently is not enough for reversal.

The key case is *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), where Justice White, writing for the Court, gave new precision to the "clearly erroneous" standard.

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of

fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

470 U.S. at 573-74.

The Court explained the policy and rationale for mandating deference to the trial court as the finder of fact in the following way:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

470 U.S. at 574-75.

The Court stated further that the fact-finder's choice controls "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574.

This was no new learning. The *Anderson* case reinforces, and spells out even more forcefully, what had been announced three years earlier in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982):

By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the instances of mislabeling were not clearly erroneous, they should not have been disturbed.

456 U.S. at 856. And again:

An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950).

456 U.S. at 857-58.

The Fifth Circuit's opinion here suggests that the court regarded its authority on review as limited only in the sense that it give "due regard to the witness' credibility." 937 F.2d at 251. (Pet. for Cert. App. 7a) This

interpretation is given credence by the court's independent, extensive, and probing assessment of the documentary evidence. See 937 F.2d at 251-53. (Pet. for Cert. App. 8a-12a) While there might have been some question of different standards of deference for documentary evidence and oral testimony prior to *Inwood*, *Anderson*, and the 1985 amendment, there can now be no question.¹¹

This Court in *Amadeo v. Zant*, 486 U.S. 214 (1988), reversed a decision in which, like the Fifth Circuit's decision here, the court of appeals "offered factual rather than legal grounds for its reversal of the district court's order." Quoting and restating the rule of *Anderson v. City of Bessemer City*, this Court emphasized the proper application of the clearly-erroneous standard as follows:

We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that "[i]f the district court's account of the

¹¹ As amended, effective December 1, 1985, Rule 52(a) expressly provides that findings of fact, "whether based on oral or documentary evidence," shall not be set aside unless clearly erroneous. The notes of the Advisory Committee on Rules make clear that the purpose of the 1985 amendment was to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the courts, to eliminate the disparity between the standard of review as stated in the rules and the practice of some courts of appeal, and to promote nationwide uniformity. Specific reference is made to the distinction some appellate courts had applied to findings based on documentary evidence as distinguished from those involving credibility determinations, as well as to the decision of this Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), recognizing that the issue had not been resolved by this Court.

evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, *supra*.

486 U.S. at 223.

In *Amadeo*, there was significant evidence supporting the findings of fact favored by the court of appeals. The Court nevertheless reversed on the ground that the reviewing court could not select between alternative permissible views but was, rather, required to accept the findings made by the trial court.

Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion, as we describe in more detail below. We frequently have emphasized that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S., at 574, citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982). We reaffirm that stricture today.

486 U.S. at 225-26.

In applying the "clearly erroneous" standard, no distinction is to be made between "ultimate" findings of fact by the trial court and "subsidiary" findings.

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

If the trial court has failed to make findings essential to a proper resolution of the issue, the reviewing court can only remand for further findings. Fact-finding responsibility remains exclusively within the province of the trial court. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986). In reversing the court of appeals in that case because it had usurped the fact-finding role, this Court further amplified the scope of review under Rule 52(a):

If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

475 U.S. at 714.

Although the Fifth Circuit gave nominal recognition to the constraints imposed upon it by Rule 52(a), it effectively disregarded those constraints and substituted its own findings of fact for those of the trial court. Further, it concluded that, in determining the location of the thalweg, Mississippi's expert, Smith, had misinterpreted the documentary evidence and drawn erroneous conclusions from it.¹² It accepted the interpretation of the Louisiana experts that had been expressly rejected by the trial court and adopted their interpretation as its own.¹³ If, as

¹² The Fifth Circuit drew support for its rejection of Mr. Smith's interpretation with respect to the location of the thalweg in the vicinity of Stack Island in 1881 from this Court's rejection of the same witness's testimony in *Louisiana v. Mississippi*, 466 U.S. 96, 103-06 (1984). See 937 F.2d at 252. (Pet. for Cert. App. 11a) This Court, however, was exercising its original jurisdiction and made its own independent review of the record. In doing so, it noted simply that "qualified experts differed in their conclusions." 466 U.S. at 106. This is quite different from a review under the "clearly erroneous" standard of Rule 52(a).

¹³ Like the decision reviewed in *Amadeo*, 486 U.S. 214, the Fifth Circuit's opinion offers factual rather than legal grounds for reversing the trial court. The opinion states that it was "illogical" for vessels to employ a route that was longer and marked by treacherous "shoals." On this basis, the Fifth Circuit held that the thalweg was incorrectly found by the trial court. 937 F.2d at 251-52. (Pet. for Cert. App. 9a) It brushed aside evidence on which the trial court had relied. A surveyor's notation that there was a "good deep channel" (Pl.Ex. 7; Tr. 307, 307; J.A. 132) to the west of Stack Island was dismissed as a "vague notation" and "less than determinative." *Id.* The placement of United States navigation lights on the banks of the river as reflected on a shoreline survey (Pl.Ex. 8, Tr. 313, 313; J.A. 133) was thought to be "inconclusive." 937

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repeatedly stated by the Fifth Circuit, the evidence is truly "inconclusive," there must be more than one permissible view of it and the district court's findings cannot be set aside as clearly erroneous. In a comment bearing directly on the conflict in expert testimony before the trial court, this Court said:

[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson, 470 U.S. at 575.

With respect to the Doctrine of Acquiescence, the Fifth Circuit simply dismissed the findings of the trial court, stating that the trial court "had improperly applied the law to its factual findings." 937 F.2d at 253. (Pet. for Cert. App. 12a) The Fifth Circuit conducted its review *de novo* and concluded that the trial court ruling could not be sustained.

Like the location of the boundary thalweg, acquiescence *vel non* is a pure fact question. As discussed previously, a substantial body of evidence exists in the record

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F.2d at 252. (Pet. for Cert. App. 10a) A reference in the shoreline survey to "shoals" at the foot of the east channel was thought to be "refuted" by hydrographic data obtained three months later and shown on another survey map, and these "factual disputes" were thought to demonstrate the "inconclusiveness" of the shoreline survey. 937 F.2d at 252, n.4. (Pet. for Cert. App. 9a)

supporting the trial court's ultimate finding of acquiescence, as well as the subsidiary findings contained in its bench opinion. The Fifth Circuit exceeded the limits of its authority in failing to accord such findings controlling effect.

In addition to its comprehensive subsidiary findings, the trial court made two conclusive, ultimate findings of fact that control this case. Neither is vulnerable under the "clearly erroneous" standard. With respect to the boundary issue, the trial court found as follows:

The Court, accordingly, concludes that the Plaintiffs' claims to the land mass insofar as claiming that it is one land mass and that it lies in the State of Mississippi are proven by a preponderance of the evidence, and the Court so finds.

(Pet. for Cert. App. 36a) Regarding acquiescence, the court found:

If the land be not in the State of Mississippi because of the thalweg boundary, that land is in the State of Mississippi under the Doctrine of Acquiescence.

(Pet. for Cert. App. 41a) The record read as a whole contains more than ample evidence to support these findings. They represent, at the very least, "permissible views" of the evidence and cannot, therefore, be deemed "clearly erroneous." They control the determination whether Stack Island lies within Mississippi or Louisiana. The Fifth Circuit was neither authorized to set these findings aside nor to render judgment for Louisiana on the basis of its own findings.

III. THE DISTRICT COURT PROPERLY ASSERTED JURISDICTION OVER LOUISIANA'S THIRD-PARTY COMPLAINT AGAINST MISSISSIPPI

In its order of March 23rd granting certiorari, the Court formulated the following question as part of the grant: "Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi." In the view of petitioners, the answer to that question is "Yes."¹⁴

The question the Court has posed raises several different issues. (1) Does the grant to this Court, in 28 U.S.C. § 1251(a), of "original and exclusive jurisdiction of all controversies between two or more States" preclude all other courts from taking jurisdiction of a controversy between two states? (2) Was Louisiana's third-party claim against Mississippi within the jurisdiction of the district court? (3) If the land in question is, as the Fifth Circuit found, in Louisiana, does that mean that the district court lacked power to exercise jurisdiction over it?

¹⁴ This is the view of the Houston group of petitioners, although it is not clear whether they have any interest in this jurisdictional question. Mississippi undoubtedly has an interest. A holding that the district court lacked jurisdiction of the third-party complaint against Mississippi would require vacation of the judgment against the state and leave Mississippi free to litigate the boundary issue anew. But Mississippi took the view when the case was here before (at a time before the district court had ruled) that the United States District Court for the Southern District of Mississippi was an adequate forum for resolution of the issue, with normal appellate review. Brief in Opposition to Motion for Leave to File Complaint, *Louisiana v. Mississippi*, No. 114, Original, October Term 1988. Mississippi believes that what it said in 1988 was correct and it adheres to that position now.

Section 1251 of the Judicial Code draws a seemingly sharp distinction. Subsection (a) gives this Court "original and exclusive jurisdiction of all controversies between two or more States," while subsection (b) gives the Court "original but not exclusive jurisdiction" of three other classes of cases. But as the statute has been repeatedly applied, it means less than it says.

We have generally observed that the Court's original jurisdiction should be exercised "sparingly," *Maryland v. Louisiana*, 451 U.S. at 739, 101 S.Ct. at 2125; *United States v. Nevada*, 412 U.S. 534, 538, 93 S.Ct. 2763, 2765, 37 L.Ed.2d 132 (1973), and this Court applies discretion when accepting original cases, even as to actions between States where our jurisdiction is exclusive. As stated not long ago:

"In recent years, we have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction. See *Maryland v. Louisiana*, 451 U.S. 725, 743, [101 S.Ct. 2114, 2127, 68 L.Ed.2d 576] (1981); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499 [91 S.Ct. 1005, 1010, 28 L.Ed.2d 256] (1971). We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. 554, 570, 103 S.Ct. 2558, 2568 77 L.Ed.2d 1 (1983).

Specifically, we have imposed prudential and equitable limitations upon the exercise of our original jurisdiction, and of these limitations we have said:

"We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 92 S.Ct. 1385, 1387, 31 L.Ed.2d 712 (1972); *California v. Texas*, 457 U.S. 164, 168, 102 S.Ct. 2335, 2337, 72 L.Ed.2d 755 (1982).

Wyoming v. Oklahoma, 112 S. Ct. 789, 798 (1992).

As Justice Thomas pointed out in his dissent from the opinion just quoted, the application of this discretion to cases made "exclusive" by § 1251(a) has been questioned both within and without the Court. *Wyoming v. Oklahoma*, 112 S. Ct. at 811 n.1 (Thomas, J., dissenting). Some commentators have been sharply critical. E.g., BATOR, MELTZER, MISHKIN & SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 344 (3d ed. 1988) (Court's explanation of its present approach is "an oxymoron"); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 561 (1985) (criticism of the Court's approach is "unanswerable"). Other commentators, however, have supported what the Court has done.

Both the development and exercise of this superficially surprising power are justified for the reasons announced by the Court itself. . . . Absent any indication that Congress has ever addressed the question of discretion to deny jurisdiction, however, it again seems proper to

deny jurisdiction if the issues offered for litigation are clearly subject to resolution in an alternative forum and ensuing review by the Supreme Court.

17 WRIGHT, MILLER & COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 4053, at 260-61, 269 (1988). See also Note, *Exclusive Original Jurisdiction of the United State Supreme Court: Does It Still Exist?*, 1982 B.Y.U. L. Rev. 727, 751 (concluding that "[p]erhaps the Court is right in making this change").

Whatever the commentators may think, it is the law of this Court that it has discretion whether to allow its original jurisdiction to be invoked in suits between states within § 1251(a) and that it can refuse leave to file if there is an appropriate forum in which the issues can be litigated. In addition to the cases cited for this proposition in the Court's opinion in *Wyoming v. Oklahoma*, quoted above, see *Arizona v. New Mexico*, 425 U.S. 794 (1976), *California v. West Virginia*, 454 U.S. 1027 (1981), and, most conspicuously, this very controversy, in which the Court denied Louisiana's motion for leave to file a bill of complaint. *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (Pet. for Cert. App. 91a).

All of the cases recognizing discretion in this Court to refuse to hear cases that are within its original jurisdiction have emphasized that this is proper only if the issues are clearly subject to resolution in an alternative forum. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 799 (1992); and see *id.*, 112 S. Ct. at 811 (Thomas, J., dissenting). When the Court denied Louisiana's motion for leave to file in 1988, it must have supposed that there was a suitable forum in which this dispute could be resolved. That forum could only have been the then-pending action in the District

Court for the Southern District of Mississippi, which is now here on certiorari. That was the alternative forum referred to in Justice White's dissent from denial of leave to file, 488 U.S. at 991 (Pet. for Cert. App. 91a). It was the only alternative mentioned by the parties in their briefs. We do not suggest that the prior decision establishes as law of the case that the district court properly asserted jurisdiction of the dispute between the two states,¹⁵ but the denial of leave to file, over the dissent of three Justices who argued that there was no suitable alternative forum, must surely have rested on a considered judgment by the majority that the district court was indeed "another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), quoted in *Wyoming v. Oklahoma*, 112 S. Ct. 789, 798 (1992).

That judgment was correct. The district court, which undoubtedly had jurisdiction on the basis of diversity of citizenship of the original suit between the private parties, had jurisdiction also of Louisiana's claim in intervention and of its third-party complaint against Mississippi.

This action was commenced when plaintiffs, all of whom are alleged to be resident citizens of Mississippi or Texas, filed their Complaint to Remove Cloud on July 29, 1986. The defendants were all Louisiana riparian owners, alleged to be domiciled in Louisiana or in states other than Mississippi and Texas. Jurisdiction was asserted

¹⁵ See *Wyoming v. Oklahoma*, 112 S. Ct. 788, 796 (1992); and see *id.*, 112 S. Ct. at 804-05 (Scalia, J., dissenting).

under 28 U.S.C. § 1332 on the basis of diversity of citizenship. Jurisdiction of the original action has never been questioned. On June 17, 1987, Louisiana and the Lake Providence Port Commission moved to intervene to assert claims of their own. (J.A. 5) This motion was granted June 30, 1987. (J.A. 9) The state and the Commission prayed that the district court determine the proper boundary line between Louisiana and Mississippi and that it adjudicate "the lands in question to the proper parties as owners thereof, as between plaintiffs, defendants and intervenors." (J.A. 14) On November 16, 1987, Louisiana moved for leave to file a third-party complaint against Mississippi. This motion was granted November 23, 1987. (J.A. 21) The third-party complaint again asked the court to determine the proper boundary line between the states and to adjudicate the lands in question. (J.A. 25) In its answer to the third-party complaint, Mississippi prayed the court to declare that the lands are in Mississippi and asked also that the court adjudicate the lands in question to the proper parties as owner. (J.A. 30)

Although this Court's question goes only to jurisdiction of the third-party complaint, it is necessary first to examine the district court's assertion of jurisdiction over Louisiana as an intervenor. Unless Louisiana properly brought itself within the jurisdiction of the district court, it could not assert a third-party claim. But there are two separate bases on which the district court correctly took jurisdiction of Louisiana's claim in intervention.

First, Louisiana was invoking federal-question jurisdiction. The state's motion to intervene (J.A. 5), its memorandum in support of its motion to intervene (J.A. 7), and paragraph 1 of its intervention (J.A. 11) all claim jurisdiction under the federal-question statute, 28 U.S.C.

§ 1331, and assert that the intervenors' rights arise under the Constitution of the United States, the Act of April 6, 1812, admitting Louisiana into the Union, and the Treaty of Peace concluded September 3, 1783, between the United States and Great Britain. This is a proper invocation of federal-question jurisdiction. To the extent that Louisiana's claim is viewed as a bill to remove a cloud on title, it has long been settled that it can come within federal-question jurisdiction. *Hopkins v. Walker*, 244 U.S. 486 (1917). Even if the interaction of the forms of action and the well-pleaded complaint rule were such that a particular dispute about ownership of land would be held not to raise a federal question – see AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 170 (1969) – that could not be the rule where the boundary between two states is at issue. There is a close analogy to Indian land title. This is continuously a matter of federal law, so that even a possessory action by an Indian tribe is within federal-question jurisdiction, *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974). “[A]bsent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.” *Id.*, 414 U.S. at 674. A claim by an Indian tribe is quite unlike “garden-variety ejectment claims.” *Id.*, 414 U.S. at 684 (Rehnquist, J., concurring). On like reasoning, a claim by a state about where its boundary is must always be a matter of federal law. Either state boundaries are determined by Acts of Congress and treaties to which the United States is a party or they must be resolved by application of federal common law. “[N]either the statutes nor the decisions of either State can be conclusive.” *Hinderlider v. La Plata River & Cherry*

Creek Ditch Co., 304 U.S. 92, 110 (1938); 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4052 (1988).

Although we think it clear that Louisiana properly invoked federal-question jurisdiction as the basis for its intervention, the result would be the same even if Louisiana's claims were found not to raise a federal question. Louisiana alleged that it was entitled “to intervene in this action as a matter of right.” (J.A. 5) This was correct. Rule 24(a)(2) of the Federal Rules of Civil Procedure allows intervention of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.” Louisiana was claiming an interest in the property that was the subject of the action, and it is hard to imagine any situation in which it would be held that a sovereign state must be content to be represented by private parties. A judgment in the original action would not have been binding on Louisiana, *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963), but the principal purpose of the rewriting of Rule 24 by the 1966 amendments was “to eliminate the old reading that a would-be intervenor must be legally bound, and . . . instead the court is to view the effect on his interest with a practical eye.” WRIGHT, FEDERAL COURTS 503 (4th ed. 1983). Stare decisis by itself is now regarded as sufficient to supply the practical disadvantage that is required for intervention under Rule 24(a)(2). E.g., *Oneida Indian Nation of Wisconsin v. New York*, 732 F.2d 261 (2d Cir. 1984); *Atlantis*

Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).

Although this Court never spoke broadly to the question, the general understanding has been that ancillary jurisdiction applied, and no independent basis of jurisdiction was required, where there was intervention of right. Whether or not this is or was universally true is unimportant.

The cases in which intervention is of right because the absentee claims an interest relating to the property that is the subject of the action seem very easy. The oldest and most thoroughly established justification for ancillary jurisdiction is when property actually or constructively under the control of the court is the subject of litigation¹⁶ and this has often been the basis in modern cases for allowing intervention though there are no independent grounds of jurisdiction.

7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1917, at 475-76 (1986). Intervention by Louisiana was of right and could have been based on ancillary jurisdiction if federal-question jurisdiction of the intervention had been lacking.¹⁷

¹⁶ Citing *Phelps v. Oaks*, 117 U.S. 236 (1886), and *Krippendorf v. Hyde*, 110 U.S. 276, 285 (1884).

¹⁷ There is considerable uncertainty about how the new supplemental-jurisdiction statute, 28 U.S.C. § 1367, applies to intervention. "The vague phrasing of section 1367(b) could also, but need not, be construed to go beyond pre-existing law in limiting the availability of ancillary jurisdiction over non-diverse parties seeking to intervene as of right as plaintiffs to

(Continued on following page)

Once it is seen that the district court had jurisdiction over Louisiana as an intervenor, jurisdiction of the state's third-party complaint against Mississippi follows easily.¹⁸ The same federal questions that are raised by Louisiana's intervention are raised by its third-party complaint. Indeed the case is strongest here for application of federal common law to the extent that the boundary is not defined by Acts of Congress or by treaties. "Litigation between two or more states presents the most obvious need for rules of decision controlled by the Supreme Court." 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4052, at 252 (1988). And ancillary jurisdiction surely applies to a third-party claim against a defendant impleaded under Rule 14. That was not disturbed at all by *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). It involved the very different question whether plaintiff may amend to state a claim directly against a third-party defendant who has been brought into the case by an original defendant.

(Continued from previous page)

protect their interests in federal litigation brought by others." Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. Davis L.Rev. 735, 765 (1991). But the new statute applies only to cases commenced after December 1, 1990, and thus has no application here.

¹⁸ The Eleventh Amendment is not a barrier. Even if that immunity were otherwise applicable, it can be waived by a state and surely was waived here where Mississippi never objected to the third-party complaint, sought affirmative relief in its response, and represented to this Court that the district court was an appropriate alternative forum so that this Court should deny, as it did, Louisiana's motion for leave to file a bill of complaint here.

It had been well settled before *Owen Equipment* that there is ancillary jurisdiction over the claim by the original defendant against the third-party defendant, and that there need be no independent jurisdictional grounds for such a claim if there was diversity between the original parties or if plaintiff's claim against the original defendant raised a federal question. This is still clearly the law. Such a claim, the Court said in *Owen Equipment*, "always is" ancillary.

WRIGHT, FEDERAL COURTS 515 (4th ed. 1983)¹⁹

The final issue that is raised by the question formulated by the Court is whether the fact that the Fifth Circuit has held that the land in question is in Louisiana means that the district court in Mississippi lacked power to exercise jurisdiction over it. This argument would rely on the statement in *Durfee v. Duke*, 375 U.S. 106, 115 (1963), that "courts of one State are completely without jurisdiction directly to affect title to land in other States." On that view, if the Mississippi district court had found that Stack Island is in Mississippi and if that decision had been affirmed, the district court would have had jurisdiction and the judgment would bind all parties to the suit, but if the court (or a higher court) found that the land was on the Louisiana side of the boundary, then the

¹⁹ This result would not be changed by the 1990 statute, even if it were applicable, which it is not. See note 17 above. 28 U.S.C. § 1367(b) codifies the *Owen Equipment* rule by providing that in a diversity action "the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14 . . . of the Federal Rules of Civil Procedure," but with that exception supplemental jurisdiction under § 1367(a) extends fully to claims against third-party defendants.

Mississippi district court would be without jurisdiction and its judgment would be a nullity.

The literal language of *Durfee* supports such a result. This was the view taken by Louisiana in its unsuccessful attempt to persuade this Court to rehear its denial of leave to file in 1988. At page 9 of its Brief in Support of Petition for Rehearing, Louisiana said that "a judgment by the District Court that Island No. 94 is in Louisiana would not bind Mississippi nor necessarily the numerous private parties involved." (Pet. for Cert. App. 96a)²⁰ See also the dissent from denial of the motion for leave to file. *Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988).

We respectfully submit that it cannot be the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it. Consider how that would apply to the facts of the *Durfee* case itself. In that case the Durfees sued in state court in Nebraska to quiet title to certain bottom land in the Missouri River. Duke appeared and fully litigated the issue, arguing among other things that the land was in Missouri and that the Nebraska courts lacked jurisdiction. The Nebraska courts found that the river course had been changed by avulsion and held that the land was in Nebraska and therefore belonged to the Durfees. Two

²⁰ Louisiana also had taken this view in the district court. In its memorandum in support of its motion for separate trial of the interstate boundary issue, Louisiana said: "The determination of the legal boundary between the states by the Court will determine the limits of the jurisdiction of the Court, and may result in a determination that the ownership of the property in question is outside the limits of the Court's jurisdiction." (J.A. 34)

months later Duke brought a suit to quiet title to the same land in a state court in Missouri. This Court held unanimously that the Missouri courts (and the federal court to which the Missouri case was removed) were required to give full faith and credit to the Nebraska judgment.

Suppose, on the facts of that case, that the Nebraska courts had held that the change in the Missouri River was the result of accretion rather than avulsion and that the land was therefore in Missouri. On the argument now being considered, they would have been acting without jurisdiction, because it would now be established that the land was in another state. The Nebraska judgment, on this view, would be a nullity, and the Durfees would have been free to defend Duke's Missouri action and assert again that the land was in Nebraska.²¹

That cannot be the law. If a court has power to decide which state the land is in, it must have power to decide either way. It cannot be that a judgment is entitled to full faith and credit if the court decides one way but is a meaningless act, without legal effect, if the court reaches the other decision. As this Court said in *Underwriters National Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 495 U.S. 691, 705 n.11 (1982), *Durfee* established "the rule of jurisdictional finality" and "the *Durfee* Court explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction."

²¹ And if the Durfees prevailed on that argument, and the Missouri courts agreed with them that the land was in Nebraska, that judgment also would have been a nullity.

The statement in *Durfee* that "courts of one state are completely without jurisdiction directly to affect title to land in other States," 375 U.S. at 115, is sensible enough in the context of the cases on which it is based. The cases cited in support of this statement in note 14 of *Durfee*, as well as those cited in note 11 of *Underwriters*, are all cases in which a probate court or a divorce court or an equity court in one state purported to adjudicate title to land that was unquestionably in a second state. Those cases are quite different from cases in which the court must decide whether land is or is not within its territorial jurisdiction. As the Court said in *Durfee* itself:

Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter "to be resolved by judicial determination." . . . The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative.

375 U.S. at 115.

That is the principle that should govern here. The location of Stack Island has been fully litigated and judicially determined in a proceeding in which both of the states and all of the private parties concerned took part. The rule of jurisdictional finality means that this determination is binding on all of them. The determination will have been made by the highest court in the land. It would make a nonsense of the judicial process if this long litigation were now to amount to nothing because the courts decided the substantive issue put to them one way rather than the other.

CONCLUSION AND PRAYER

The judgment of the Fifth Circuit should be reversed. Judgment should be rendered that Stack Island lies in Mississippi and that the boundary is correctly fixed by the trial court's judgment. Alternatively, the cause should be remanded to the trial court for findings with respect to the location of the boundary thalweg on the date Louisiana was admitted to the Union or when Stack Island was first known to exist.

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In The
Supreme Court of the United States
October Term, 1992

THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,
v.

THE STATE OF LOUISIANA, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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STATEMENT OF THE CASE

Petitioners correctly state that this case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the Mississippi River known as "Stack Island" or "Island No. 94". However, the only true island in existence in the vicinity of the boundary claimed by petitioners is an extremely large island which has developed adjacent to the geographic location of original Island No. 94. This island is clearly shown on various Louisiana exhibits, such as LA-1A, a U.S. Geological Survey Quadrangle Map¹. Also shown on the map is the 1881 location of the island patented to petitioners in 1888, being only 117.96 acres in size at the time. Later, it washed away entirely as shown by the ample testimony, documentary evidence and holding of the trial court in this case. See page 3, *infra*. That court, of course, also held that the island had migrated across the river, but did not discuss the "new" island in the river at the location of Island No. 94 in 1881.

Petitioners never address the principal object of their claim – the accretion along the west bank of the river at Lake Providence, Louisiana. They are quite careful to avoid detailed factual matters and confine the argument largely to legal principles found in the case law, without applying them to the specific facts of this case.

The accretionary features claimed by petitioners are a part of the west bank of the Mississippi River at Lake Providence, Louisiana (P-1, P-2, LA-1, LA-1A) and are entirely different formations from Island No. 94. They are

¹ J.A. 135

located in a different geographic vicinity; they have different histories of origin; they are different in size and shape; and at all times since their formation in the 1930's, have been west of the boundary between the States of Louisiana and Mississippi. They are connected to and are a part of the Louisiana bank and have no island features whatever, except at extreme high water. The designation of these accretions as "Stack Island" on some maps is apparently due to the work of draftsmen seeking to give the area a name.

While petitioners are asserting ownership to this bank accretion on the Louisiana side, they have carefully avoided any discussion of it from the very outset of the case. Even now, petitioners' brief does not mention, much less explain, how this bank accretion could be Island No. 94.

As pointed out at page 4 of Respondents' Brief In Opposition to the Petition for Writ of Certiorari, there are actually two separate geographic locations at issue, to wit:

- (1) The accretion to the west bank of the river at Lake Providence has sometimes been referred to as "the island" or "Stack Island", as it appears to be an island at extreme high water; and
- (2) The "new" island which has developed at the precise geographic location of original Island No. 94 is known as "Stack Island".

The trial court also avoided discussing the fact that there are two separate geographic locations at issue by not specifically referring to them. However, under cross-

examination the plaintiff's expert, Austin Smith drew a sketch on P-2² of the accretion against the west bank of the river. (Tr. 409-410) and on P-1 drew the original Stack Island as of 1881. (Tr. 412) His testimony shows that prior to the avulsion of 1881, the island was located geographically in T 11 N, R 9 W of the Choctaw Land District, Mississippi, while the accretion against Lake Providence on the west bank of the river is located in T 21 N, R 13 E of the Red River Land District, Louisiana. (Tr. 412) Further, Austin Smith admitted that the original Island No. 94 and "Stack Island" which has accreted to the west bank, as claimed by petitioners are not "one in the same", as he had earlier testified. (Tr. 461-463)

The district court referred to the "migrating Stack Island" in the bench opinion of June 23, 1989, page 16. That court correctly found, as Louisiana contends, that the island "was eroding and accreting and migrating generally in a southwesterly direction, by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared * * *".

The State of Louisiana and the Lake Providence Port Commission contend, as set forth in paragraph 7(d) of the Pre-Trial Order filed herein (Tr. 664-665), that Island No. Ninety-four (94) in the Mississippi River patented by the United States on December 29, 1888 to Stephen B. Blackwell, located in Township 11 North, Range 9 West of Choctaw Meridian in Mississippi, containing 117.96 acres

² J.A. 128. Refer to original exhibit as this appendix exhibit does not contain the sketch.

was eroded away by the natural processes of the Mississippi River, subsequently re-formed and exists near its location at the time of the federal patent. It is not, however, to be confused with accretion to the west bank.

Petitioners' claimed boundary is drawn along a former bank line on the Louisiana side of the river. In this reach of the river, following completion of dike works construction by the Mississippi River Commission during 1881-1882, the river moved suddenly and avulsively from a channel east of Stack Island and commenced a slow westerly migration. It cut heavily into the west bank and then moved easterly again, re-building the eroded sections of land on the Louisiana side. The bank accretion occupies geographic space patented out by Louisiana, taxed by Louisiana and owned and possessed by Louisiana residents. As shown by Pl. Ex. 64 (J.A. 75), the certificate of the Chancery Clerk of Issaquena County, Mississippi, any taxes paid by petitioners were for lands on the east bank located in Section 27, T 11 N, R 9 W of the Choctaw Land District in Mississippi. Conversely, the Louisiana citizenry paid taxes on lands within T 21 N, R 13 E of the Red River Land District in Louisiana, being the riparian sections of land with accretion fronting on the west bank of the river. This is clearly shown by La. Ex. 37 and accompanying stipulation (Tr. 827-832) among counsel to the general effect that the accretion claimed by petitioners on the west bank attached to riparian lands in Louisiana and was possessed by Louisianans, who paid taxes on it.

Petitioners' expert, Austin Smith, drew a boundary generally along the Louisiana levee on the west bank in order to capture ownership of both the accretion to the

west bank, as well as the new and extremely large island located in the river itself in the vicinity of the 1881 island. The accretion to the west bank has been assimilated into the land mass along the west bank, and was so found even by the district court. In its Bench Opinion of June 23, 1989, the court found that this accretion to the "Louisiana shore" is "for large portions of the year completely dry between what is called the island and what is called the high bank on the Louisiana side", making it a part of the bank.

Petitioners have been claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana and to the "new" Stack Island near Mississippi. Hence, the Fifth Circuit characterization of the boundary dispute as "treacherous".

In the district court and the Fifth Circuit, petitioners have claimed that two avulsions occurred in the Mississippi River in the vicinity of Lake Providence, but failed at trial to present testimony or evidence of either. The Lake Providence Reach of the river is straight in its alignment, making an avulsion extremely unlikely without the intervention of man-made works, such as the 1881-1882 Mississippi River Commission dike project which Louisiana clearly established from U.S. Government documents. The avulsion caused by the dike project is the only one which has occurred in this reach of the river in recorded history since long prior to the time of sovereignty of the two states.

Petitioners' theory of the case changed dramatically after the decision by the Fifth Circuit. This was pointed out in both Respondents' Answer to the Petition for the

Rehearing to the Fifth Circuit, at page 1, and in Respondents' Brief In Opposition to the Petition for Writ of Certiorari, at page 6.

In the original Complaint to Remove Cloud, filed in the district court, paragraphs 55 to 58, petitioners describe river actions commencing "about 1908" as being avulsive in nature and having the effect of fixing the boundary. This position is explicitly re-stated in the Proposed Findings of Fact and Conclusions of Law of petitioners (J.A. 47, 55, 61), including the State of Mississippi. These same contentions comprise the claims of the individual petitioners and the State of Mississippi in the Pre-Trial Order in this case. There is no reference to earlier periods of time, except as to when Island No. 94 was surveyed, 1881, and patented, 1888.

Petitioners did not offer available evidence or testimony to show the locations of Island No. 94 as it periodically appeared, disappeared and re-appeared from earliest known times, although respondents had listed such evidence in the Pre-Trial Order.

The May 19, 1992 Brief For Petitioners represents a clear departure from previous positions: it now suggests that the thalweg-boundary between the states forms at the time of admission to the Union (pp. 6, 10-11, 13, 15, 16-17). In earlier pleadings, petitioners' simply eluded to the "time of the formation of Stack Island," without any elaboration.³ This shows petitioners could not document or identify the precise time of formation, nor can they now.

³ See, for instance, Proposed Findings of Fact and Conclusions of Law of petitioners, paragraphs 1-3. (J.A. 47, 55, 61)

During the trial at Vicksburg, there was neither emphasis on the location of the thalweg as of 1812 nor any development (by Mississippi) of the historic processes at work for the formation of Stack Island. The only evidence Mississippi presented at trial even remotely suggestive of the matter of the existence of Stack Island in 1812 was the 1826-27 township survey which included a simple sketch of "Stack Island" in the Mississippi River. This land district survey, with its Louisiana counterpart, was introduced with no comment concerning a possible 1812 boundary-thalweg, nor is any shown on the survey since it was made for land patent purposes and not as a hydrographic or river survey.

Closely related to the previous item, Mississippi now repeatedly claims that its introduction of the 1826-27 surveys provides the only evidence of the boundary-thalweg or location of Stack Island prior to 1881. Indeed, petitioners maintain - again, repeatedly - that this evidence was "uncontradicted" by Louisiana. Apart from the reality that Louisiana was prepared to introduce considerable evidence, as reflected by its pre-trial list of exhibits concerning the pre-1881 thalweg if the matter had been properly raised by Mississippi, the 1826-27 to 1881 Stack Island thalweg now claimed by Mississippi received adequate contradiction by Louisiana's description of geomorphological and geographical processes involved in the formation(s) of "Stack Island" and by the Humphreys & Abbott map of 1861, LA-8, as well as the 1860-1930 comparison map prepared by the Mississippi River Commission, LA-32H. (J.A. 174) See also the Fisk

materials introduced at trial as LA-32G.⁴ Louisiana clearly demonstrated that in this reach of the Mississippi River, "Stack Island" and related accretionary features constituted "sand deposits in which" the river freely migrated. See also, Fisk. Accordingly, the general area location of "Stack Island" experienced the formation of several islands, sandbars, or shoals over the course of time. Therefore, the current Mississippi position is not only newly conjectural, but also a misrepresentation of the record.

Petitioners built their entire case upon the allegations set forth in the Complaint to Remove Cloud, essentially contending that at least two avulsions in the Lake Providence Reach of the river had the effect of freezing the thalweg-boundary along the present Louisiana levee. Petitioner's expert, Austin Smith, could not describe or document the claimed avulsions at trial, only a gradual migration of the river from east to west and back again. His testimony about the floods of 1912 and 1913 working avulsive changes to the east chute channel was invalidated by Louisiana evidence, LA-16 and LA-16A⁵, showing the change had already occurred by gradual processes as early as 1908. Thus, no avulsive act was shown to support petitioners' claims. Petitioners did not list or use the exhibits relied upon by Louisiana in the pre-trial order, particularly, items LA-1 through LA-8, LA-10, LA-13, LA14, LA-16, LA-16A, LA-18A, LA-19,

⁴ J.A. 167 "Geological Investigation of the Alluvial Valley of the Lower Mississippi River," made for the War Department, Corps of Engineers, U. S. Army, by Harold N. Fisk, PH.D. Text with map.

⁵ J.A. 138. Official maps of the U.S. Geological Survey, the State of Louisiana, and the Fifth Louisiana Levee District.

LA-21, LA-32G, LA-32H, and others which establish accurately the fact that Island No. 94 was not in existence at the time of sovereignty of either state, periodically disappeared, and was west of the thalweg boundary as of 1879, prior to patent. These exhibits were exchanged with petitioners and were freely available for use, but were damaging to their position. Hence, they were not used by petitioners, whose expert, Smith had no explanation for them, such as LA-16, LA-16A and LA-18A.

SUMMARY OF THE ARGUMENT

Petitioners now argue for a thalweg-boundary as of the time of the admission of the states into the Union, without having previously specified the dates of admission or offered any evidence which might support such a finding. This new "time of sovereignty" theory is misleading for three reasons. First, the formation known as Island No. 94 was not in existence at the time of sovereignty of either state. Secondly, it periodically washes away and reforms anew in a different location. Third, all known evidence favors placement of both Island No. 94 west of the thalweg-boundary as of 1879, as well as the new island on Louisiana's side of the frozen thalweg-boundary. The accretion to the west bank belongs to the riparian owners in Louisiana.

Petitioners also contend, alternatively, and the district court held, that if they have not proved title to the accretion to the Louisiana bank as being Island No. 94, then it should be awarded to them under the doctrine of acquiescence. The Fifth Circuit properly held that a few "isolated incidents do not constitute a 'long-continued and uninterrupted assertion of dominion and jurisdiction over an area . . .'" 937 F.2d at 253.

The appellate court was quite correct in its findings, as shown by the ample testimony in the record.

Petitioners did not raise any issue concerning a pre-1881 thalweg-boundary in the trial court or the Fifth Circuit and certainly offered no evidence to support such a contention. After the Fifth Circuit decision, this argument came forward in the application for re-hearing. The issue was simply not addressed by petitioners in the trial court, although Louisiana had listed ample evidence to refute such a contention in the event the matter was raised.

Louisiana's intervention and third-party complaint were properly before the district court, but it had no power to exercise jurisdiction to affect title to land in Louisiana.

Boundary cases between states are one type of controversy where, ultimately, final adjudication and relief may be had only before the Supreme Court.

ARGUMENT

I. The Historical Evidence and Petitioners' New "Time of Sovereignty" Theory

Petitioners contend that P-1 (J.A. 127), the 1826-27 U.S. Survey, is the earliest evidence *in the record* showing the location of Stack Island (emphasis ours). This is true, because petitioners did not introduce more relevant maps closer to the time of Louisiana's sovereignty in 1812, which would show that Island No. 94 was not in existence at the time.⁶ As will be shown below, this map and

⁶ See Respondents Answer to the Petition for rehearing to the Fifth Circuit, pages 3 et seq.

the others cited by petitioners are not relevant under any theory and do not support the new "time of sovereignty" theory suggested in the Brief for Petitioners.

Petitioners might have used the 1821 "Map of Reconnaissance of Mississippi River", by Captain H. Young and Captain W.T. Poussin (LA-3A) which clearly shows no Island No. 94 at that time. Sandbars, however, are shown on Louisiana's side of the navigation channel between Islands 93 and 95, being a subsequent location for Island No. 94 in *Louisiana waters*. Thus, this map favors Louisiana and was not used by petitioners, who pursued a 1930's avulsion theory at trial.

Petitioners might also have selected the 1818 edition of "The Navigator", LA-3, very near the year of Louisiana's admission into the Union. Island No. 94 did not exist at that time, having been washed away in 1811 or 1812 by an enormous earthquake or by floods. It is quite clear that the island has been "sunk by the earthquake [1811-1812] or swept off by the floods", including the bar which had existed below it.⁷

Mississippi was not admitted into the Union until 1817, being a territory prior to that time. If the critical date for the location of Stack Island in Mississippi relates to the time of state sovereignty, it would relate to the sovereignty of Mississippi and not Louisiana. Since Stack

⁷ See *Lloyd's Steamboat Directory, and Disasters On the Western Waters*, documenting the great earthquake of 1812 and floods, attached as Item 2 in the Appendix to respondents answer to the petition for rehearing to the Fifth Circuit filed by petitioners herein.

Island was not in existence at that time, the date of Mississippi's sovereignty would not be relevant.

Petitioners argue that the 1867 Meriweather map (Pl. Ex. 3; J.A. 129) shows the island located in Mississippi, but that time period is not relevant under petitioners' own theory that the time of Louisiana's sovereignty is "the critical time." Quite importantly, what is argued to be Stack Island in 1867 is shown as accretion to the bank and not a separate island formation at all.

Petitioners argue that the 1874 reconnaissance map of Major Suter (Pl. Ex 4; J.A. 130) is important and that it shows Island No. 94 as "land in place". Counsel for Petitioners may not be aware that the Suter survey was merely a "reconnaissance survey" made from the Pilot House of the board on which Major Suter was riding downstream, and does not purport to be an accurate survey at all, but, again, only a sketch for the purpose of estimating the costs of improving certain routes along the river⁸. At that

⁸ The report of Major Charles R. Suter, Corps of Engineers, dated February 18, 1875, issued from the Engineer Office, United States Army, reporting to Congress concerning its appropriation of \$200,000.00 for surveys and estimates for the improvement of certain routes recommended by the Senate Select Committee on Transportation Routes to the Seaboard advises that "An engineering party was placed on one of the Government streamers and sent into the field, with instructions to sketch the river carefully from pilot-house of the steamer" It also states that "Although the information obtained by this reconnaissance is not sufficiently detailed or extensive to allow estimates of the cost of the improvement recommended to be made, yet it will, I hope, be sufficient to point out the nature of the improvement required, and the means by which it can be effected." At page 496.

time, as in 1867, the formation previously known as Island No. 94 had become a *low water elevation sand bar* solidly accreted to the eastern bank. It was no longer an island at all and did not show at high water.⁹

The 1879 Suter map (Pl. Ex. 5; J.A. 131) is very similar, showing the sandy accretion attached to the bank in the 1874 survey to be now separated at low water by the east chute channel, and now numbered Island No. 94. As detailed in the Mississippi River Commission Report to Congress, LA-18A (J.A. 143), river action had caused the chute channel to develop to such an extent as to carry the main navigation channel of the river. In fact, as detailed by the Mississippi River Commission's report discussed in the decision of the Fifth Circuit in this case, the river was eroding the bank to such an extent as to threaten to scour away significant land areas, giving rise to the need for dike works to divert the river out of the east channel and away from the bank.

As correctly described by the Fifth Circuit in its opinion of August 5, 1991:

"Thus, the boundary remained frozen in the east channel, where it lay at the time of the patent in 1881, regardless of the nature of any shift in the river's course. *Hogue*, 69 F.2d at 168.

937 F.2d at 252

⁹ Reconnaissance Surveys were conducted during the low water months of the year October, November, December, so as to describe the conditions of the river at the most difficult times for navigation. At high water, many sandbars, shoals and other conditions revealed at low water stages would be obscured by high water and not of significance to vessels on the river, as in the case of the remnants of Island No. 94 as of that time.

None of the maps introduced or argued by petitioners are within the time period cited as relevant by petitioners, the new "time of sovereignty" theory. Proper maps were available, but not used.

Petitioners' argument clearly fails if it is intended to suggest that at the time of Louisiana's sovereignty, Stack Island was surveyed as being within the territory of Mississippi or that it was in Mississippi at the time of its sovereignty. In fact and in law, as shown by the maps discussed above, Island No. 94 did not exist at either time. After its formation in later years, its ownership was in the U.S. government and it was not patented out until 1888. Consequently, its location at the time of patent is the only relevant time frame.

Petitioners argue that the 1826-1827 U. S. Survey is important and that it shows Stack Island east of the boundary channel. In fact, this government Township Plat was made for *land patent purposes*, does not purport to be a survey of the river, and shows only the *sketched-in* banks of the river as the western boundary of the Choctaw Land District, Mississippi. Contrary to petitioners' assertion at page 12 of their brief, no boundary channel is shown on the survey. Consequently, petitioners again misrepresent the evidence and the record of the case. This land district survey does not purport to be a river survey or hydrologic survey in any regard, does not locate the boundary channel and does not show the island's position with respect to the channel, as claimed by counsel. As discussed above, maps made both before and after this land district survey (1826-1827) trace the disappearance, reemergence and changes in Island No. 94 until the east chute channel became the dominant course of the

river in 1879, leading to the Mississippi River Commission project funded by Congress.

Petitioners argue that the 1828-29 U.S. Survey (Pl. Ex. 2; J.A. 128) clearly shows "no island" on the Louisiana side of the channel. Actually, as in the case of the 1826-1827 Township Plat, the banks of the river are only *sketched in* as the eastern boundary of the Land District North of the Red River, Louisiana, this land district survey not being a survey of the river at all. No sand bars or islands are shown in this reach of the river on either side. This was not the purpose of land district surveys.

As discussed above, periodic changes in the river had the effect of radically changing the form and location of Island No. 94 between 1811-1812 and 1881, and lead to its total disappearance by around 1943.¹⁰

Petitioners state the general rule at page 10 of their brief that the "boundary is established on the date the state is admitted to the Union." This rule, of course, admits of both definition and exceptions, such as where a boundary may be fixed by pre-statehood treaty, by subsequent changes in rivers, by interstate agreement or by judicial decree.

A significant problem in applying the general rule is the determination of the precise location of the boundary, exactly the situation now before the Court. Petitioners would like to show the boundary to be west of Island No.

¹⁰ For a thorough discussion of the evolution and eventual disappearance of Island No. 94, see Original Brief of State of Louisiana and Lake Providence Port Commission, Intervenor-Appellants, filed with the Fifth Circuit, pages 10 to 29.

94 at the time of sovereignty of either state, but as discussed above, pages 10-14, *supra*, all known and available evidence shows the island was not in existence at the time of Louisiana's admission, 1812, nor of Mississippi's, 1817. The island was known to exist prior to Louisiana's admission, but was washed away in 1811 or 1812 by the great earthquake or by floods.

Counsel for petitioners argues, quite cavalierly, at page 12 of the brief that the 1826-1827 U.S. Township Survey of T 11 N, R 9 W, Issaquena County, Mississippi¹¹ proves up the case. This has apparently become petitioners' single most important item of evidence, purportedly establishing Island No. 94 "east of the boundary channel". However, the exhibit shows no navigation channel, no boundary channel and no hint of the downstream track of navigation. Petitioners' arguments are clearly without evidentiary support. The true purpose of these government surveys has been repeatedly discussed during the course of this case, has been briefed at the Fifth Circuit, and is described above at pages 14 and 15. Other than showing a sketch of an island formation in existence as of 1826-27, the exhibit has no probative value for petitioners, nor does P-2 (J.A. 128), the corresponding land district survey on the Louisiana side of the river.

As discussed at page 12, above, Pl. Ex. 3 (J.A. 129), the 1867 Meriweather map, shows what is argued by petitioners to be Stack Island, without name or number, to be accretion to the Mississippi bank. Pl. Ex. 4 (J.A. 130), an 1874 reconnaissance, shows that substantial additional

¹¹ Pl. Ex. 1, J.A. 127

accretion has attached to the bank, but that the island has re-formed downstream adjacent to Lake Providence, Louisiana. At this time, 1874, there is no island at the location of the 1881 survey of Stack Island.

As shown by Pl. Ex. 5, the 1879 Suter map, the 1874 accretion has now been severed by a rapidly enlarging chute channel. This led to the dikes construction program of the Mississippi River Commission which was the subject of the Fifth Circuit opinion.

The Fifth Circuit, in formulating its decision in this case, reviewed the entire record of the case and concluded, in part, as follows:

In reaching its conclusion, the district court relied primarily on the interpretation given by Austin Smith, Mississippi's only expert witness, of information contained in an 1881 shoreline survey. The district court considered the surveyor's notation of a "good deep channel" to the west of the island, and Smith's testimony that depth was the determinative factor, as persuasive evidence of the dominance of that channel. It also noted the presence of a government navigation light on the west bank of the river near the island, concluding that light served to guide river traffic from the head of Stack Island down the west channel. Without elaboration, the court pronounced an 1881 survey accompanying a Mississippi River Commission (MRC) study inconclusive, and declined to consider it in formulating its findings. Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence we are "left with the clear impression

that an error has been made." *Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967). (Emphasis ours)

937 F.2d at 251

The Fifth Circuit clearly points out the fundamental error of the trial court in disregarding essential and controlling items of evidence. Primarily, the trial court ignored an historical and unassailable technical document, the printed report of the Mississippi River Commission (MRC) contained in a congressional document reviewing the status of several projects funded by Congressional appropriation. In this instance, the report described in detail the location of the main navigation channel at Stack Island in 1881 as being in the east chute channel. The purpose of the project was to divert the river to the west of Stack Island. The report chronicles construction efforts, problems encountered, and the ultimate diversion of the Mississippi out of the east chute channel, "as shown by the high-water survey of April 1883". (J.A. 154) The report was accompanied by two maps prepared from an 1881 and 1883 hydrographic surveys with a map legend explaining water elevations, dikeworks, bank and shoal information and, most importantly, the tracks of navigation as of December, 1881, and September, 1883. These maps are LA-18A, colored to emphasize the technical data portrayed for the two time periods of the surveys. (J.A. 163, 164).

The report and maps were carefully explained by Louisiana's experts, as follows: Dr. Ernest S. Easterly, III (Tr. 633-637); Mr. Hatley Harrison (Tr. 697, 707, 713-718) There was no contrary testimony or documents offered and the explanations contained in the report are unrebutted.

It is clear beyond any doubt that the construction work was to force "the main channel of the river to the right of the Island and building a bar to the head of Stack Island, as shown by the high-water survey of April, 1883." (J.A. 154, 155) This project commenced in 1881 as one of the first projects of the Mississippi River Commission to divert the main channel of the river from the east chute channel of Stack Island to the west or to the right of the island to prevent further bank caving on the Mississippi shore and to provide a good stable channel to the west of the island.

It is clear from the 1879 surveys discussed above, that as of 1879 through 1881, the main channel of the river was in the east chute. Immediately upon completion of the construction of the dikes, "the channel of the river" was forced out of the east chute channel "to the right of the island and building a bar to the head of Stack Island, as shown by the high-water survey of April, 1883." (J.A. 154)

Based upon review of this evidence, the Fifth Circuit further held that:

We recognize that it is not within the province of the reviewing court to second-guess the district court's assessment of Smith's credibility as a witness. However, it is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinion. The first such piece of evidence is the hydrographic survey completed in December of 1881 pursuant to a major Congressionally-funded MRC improvement plan. That plan, for which Congress appropriated nearly one million dollars, was designed in part to improve navigation in the

vicinity of the Lake Providence reach. The report issued in 1883 at the conclusion of the project clearly designates the east channel as the "main channel" at the time of the December 1881 survey. For example, the report lists as one of the "general effect[s] of the work" the "closing of the main channel of the river . . . and bringing it back to the [downstream] right of Stack Island by a system of deflecting dikes."

The report continues:

. . . In order to force the main channel of the river which flowed down the [east channel] . . . a main dike . . . was driven from a point below the foot of Baleshed Bar to the head of Stack Island, leaving the low water main channel from Longwood through the [east channel] open for the passage of boats. (emphasis added) (See J.A. 154)

This district court also ignored the hydrographic data contained in an MRC survey depicting the topography and hydrography of this portion of the river in 1881-82. While those data indicate the presence of shoals near the northern end of Stack Island in the west channel, the hydrographic soundings depict ample depths, even at low water, for typical river traffic in the east channel. Given these facts, it is illogical that vessels would employ a route that was not only approximately one mile longer, but also marked by treacherous shoals.

It is to be noted that the Fifth Circuit specifically found and held, by the language quoted above, that Mississippi's expert witness, like the district court itself, "disregarded the only conclusive pieces of evidence in formulating his opinion". The lower court simply

adopted Smith's erroneous interpretation of available evidence, even though the correct evidence was offered, explained, admitted by Louisiana and went unrebutted.

After reviewing and rejecting the inconclusive evidence upon which Smith relied, the Fifth Circuit stated:

Thus, we find the court clearly erred in relying upon evidence, that regardless of its veracity, could not support its finding.

937 F.2d at 252

The two surveys shown on the map which is a part of LA-18A (J.A. 143) clearly show that the main channel of the river was flowing east of the island at the time the island was patented to Stephen B. Blackwell, based on the 1881 hydrographic surveys. The sudden, perceptible and avulsive diversion of the river from the east chute channel to the west had the legal effect of freezing the boundary in the east chute channel. There is no record of any other sudden, immediate or avulsive changes in this reach of the river from 1881 until the present date. The only other changes were the typical slow, gradual and meandering changes of the Mississippi over the course of time and during periods of high water. The river has never breached its banks, cut through the levees or made a cutoff loop of the river at any time pertinent to the issues of this case in this region. Petitioners claim avulsive actions of the river favored a westerly track of navigation, as discussed above, but never produced any testimony or evidence to support this claim. Parenthetically, no testimony or evidence was offered to show Island No. 94 was in existence "at the time of sovereignty", nor where the thalweg-boundary may have

been located. The island was not formed until shortly before its patent out of the United States, and consequently, that becomes the only relevant time for consideration of the application of the rules of law pertaining to river boundaries.

Therefore, petitioners' argument at page 16 of their brief that Louisiana had the burden of proof totally fails. Actually, petitioners admit that their only evidence of the claimed location of the island in 1812 was the 1826 land district survey, but this issue was not raised by them in the district court. Clearly, petitioners had the burden of proof and failed to carry it. Cf. *Kansas v. Missouri*, 322 U.S. 213 (1944). It is also apparent that their evidentiary shortfall is acknowledged in the brief now before this Court. At page 17, petitioners state:

If a specific finding of the location of the thalweg at the time of Louisiana's admission to the Union or whenever Stack Island was formed is required, a remand to the district court would be appropriate to close the gap.

Obviously, petitioners would embrace a remand of the case to submit additional evidence of some type in an effort "to close the gap."

In the trial court and the Fifth Circuit, respondents argued that the ordinary course of traffic on the river for all pertinent periods of time defines the thalweg, except where a former thalweg has become dead or frozen. An avulsive change occurred in 1881-1882 when the tract of navigation or thalweg of the Mississippi River was suddenly and avulsively diverted from east channel Stack Island Chute on the Mississippi side of Stack Island to the

Louisiana side of Stack Island by the construction of dikes across the head of the chute by the Mississippi River Commission. The thalweg was thus immobilized in east Stack Island Chute, freezing the boundary in that location as to that segment or reach of the river, only. This frozen thalweg connects at the north and south to the live thalweg, as shown on LA-1. After 1909, as reflected by LA-16, LA-16A and the testimony of Mr. Harrison, the river reoccupied the east chute channel. Thus, the live thalweg is in the same position, generally, as the frozen thalweg of 1881-1882 and has remained there to this day.

As a general proposition, the thalweg lies in the middle of the main navigation channel of the Mississippi River as the main navigation channel exists today, subject to the avulsive change which took place in 1881-1882, as described above.

As Louisiana demonstrated through the exhibits offered and the testimony of its witnesses, the live thalweg is defined by the ordinary downstream course of traffic on the river, i.e., the course usually followed by downstream navigation. See *State of Louisiana v. State of Mississippi*, 466 U.S. 96 (1984), at page 79, citing *Iowa v. Illinois*, 147 U.S. at 13; *Minnesota v. Wisconsin*, 252 U.S. at 282. See *New Jersey v. Delaware*, 291 U.S. 361, 379 (1934).

The boundary may become fixed when, by avulsive action, the stream suddenly leaves its old bed and forms a new one. *Arkansas v. Tennessee*, 246 U.S. at 173, 175; *Arkansas v. Tennessee*, 397 U.S., at 89-90.

These cases and legions of others were available to the district court for guidance, but it chose instead to follow the several cases cited at page 3 of the Judgment of

July 3, 1989. The cases have little applicability to the case now at hand, and are based on entirely different facts.

In its bench opinion of June 23, 1989, page 16, the district court concluded that the accretion against the west bank of the river at Lake Providence "is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions, less erosion". This holding is clearly erroneous and fundamentally ignores hydrologic and geomorphological changes described by the experts. Basically, the district court held that the island had "moved" from the one land district to another, but was the same island, a physically impossible event.

The effect of the district court decision is to grant to the Mississippi petitioners all accretion along the west bank of the Mississippi River, from above the Town of Lake Providence to miles below the Town of Lake Providence, an area of thousands of acres. Since petitioner's expert, Austin Smith, conceded on cross examination that the accretions to the west bank of the river were in the Red River Land District in Louisiana, across the river from the Choctaw Land District in Mississippi, they are judicially admitted to be in Louisiana. Louisiana's experts also located the accretions in that geographic location, by section, township and range, and by latitude and longitude. However, the district court held these accreted lands on the Louisiana bank to be in Mississippi, disregarding the geographic difference in location by which the accretion is miles away from the patent calls of Island No. 94.

For these reasons and based upon the cited jurisprudence, the opinion of the Fifth Circuit is imminently correct.

II. The Doctrine of Acquiescence

There is substantial testimony in the record concerning use, possession and acquiescence from both witnesses for petitioners and witnesses for respondents, as well as individual Louisiana residents who were sued in the district court.

The bulk of testimony from petitioners was in the form of hearsay and uncorroborated recollections from Mississippi witnesses described by the Fifth Circuit as a "colorful assortment". (937 F.2d at 253) The lower court was both correct and kind in its description. Some of these witnesses claimed to have used the accretion on the west bank for their own purposes and it was obviously in their interest to seek to maintain use, if possible.

According to their testimony, "Jelly" Higgins had run cattle on the island and was aware that other persons unknown to him were planting cottonwood trees; his brother was running goats on the island (Tr. 44); others were hunting on the island (Tr. 49); pulpwood people established a camp (Tr. 50); no fences were present (Tr. 54); the witness was using a Louisiana hunting license (Tr. 54); and Mississippi deer tags (Tr. 55). While he denied that any Louisiana Game Wardens ever exercised jurisdiction on the island (Tr. 57), this was later contradicted in Phase II of the trial by the testimony of several Game Wardens, Joseph Oliveros (U.S. Fish and Wildlife), Michael Murray (Louisiana Wildlife and Fisheries), and Joe Chatman (Louisiana Wildlife and Fisheries) and other witnesses for Louisiana (Tr. 869-959), all of whom enforced Louisiana Law on the accreted area, to the

exclusion of Mississippi claimants, wildlife agents or anyone else from Mississippi. Each testified that they had never seen anyone from Mississippi in the area until the suit was filed.

Mississippi witness Charles Shelton (Tr. 84-113) discussed hunting on the accretion; the fact that some of the accretion was clearly deemed to be in Louisiana; that Louisiana Sheriff Sam House claimed some of the accretion as his own, being attached to his riparian property (Tr. 104); that Sheriff House placed a fence around his claim; and that James Kelly went to jail for growing marijuana on the accretion (Tr. 105). Most of the sketchy information presented dealt not with acquiescence, but with claimed possessory acts.

Louisiana witnesses testified concerning ownership of the accretions to the west bank, use of the property for sand and gravel operations, hunting and other recreational purposes. For instance, Mrs. Vail Delony (Tr. 895-900) testified that she moved to Lake Providence in 1925, married in 1926 and had been on the property at issue many times, hunting there and was familiar with her husband's sand mining operations there. Mrs. Delony testified that only the Delony family hunted on the property and she had never seen anyone else there for that purpose and had never heard of the Houston family until the lawsuit was filed. Mrs. Delony's husband was Speaker of the Louisiana House of Representatives and the family has lived on the property since before the turn of the century.

Mrs. Delony's daughter, Elizabeth D. Reed, also testified (Tr. 869-895), including evidence of the family's

ownership of the riparian lands and the exercise of possession to the waters edge (Tr. 872), produced a Judgment of Possession (proffer LA-83) (Tr. 879-881); timber operations (Tr. 884), hunting leases (Tr. 885); fishing (Tr. 886); timber cutting rights to United States Gypsum Company (Tr. 887); and various other acts of physical possession over the property at issue. It is to be noted that the trial court did not want to allow the testimony of Ms. Reed and sought to prevent it, referring to the earlier Phase I decision by which the court established a boundary between the states. (Tr. 871-880)

Louisiana also called other local witnesses who were familiar with the accretion attached to the west bank at Lake Providence and to establish that they had hunted and fished in the area for many years, virtually all of their lives, without interruption. For instance, Captain Jack Wyly, a Lake Providence attorney born in 1918, testified extensively about his use of the accreted area for hunting and fishing, swimming, etc., testifying that he engaged in these activities commencing sixty (60) years ago (Tr. 556). He also described his father's farming the land (Tr. 561); the gradual development of the accretion along the Louisiana shore (Tr. 562); island formations developing south of the bank accretion (Tr. 563), and generally corroborated the testimony of the Louisiana experts as to the development of the islands and accretion to the west bank. (Tr. 551-585)

Other lay witnesses from the area whose testimony supported the possession, use and occupancy of the accreted lands on the west bank by the Louisiana riparians include Jimmy House (Tr. 534-550); Billy Jack Murray (Tr. 922-926); and Michael Murray (Tr. 905-915), all

Louisiana riparian owners. This last witness, also a Wildlife Agent with the Louisiana Department of Wildlife and Fisheries, grew up in the area and had visited the accretion from 150 to 200 times (Tr. 907). He has hunted there a number of times and enforced Louisiana game laws in that area (Tr. 907-908). He described the accreted area to the west bank (Tr. 909-910); testified that he had enforced Louisiana game laws on the entire accreted area (Tr. 912); had never seen Mississippi Wildlife Agents in the area (Tr. 913); had never seen anyone from Mississippi hunting in the area (Tr. 914); was personally involved in searching for a murderer in the area (Tr. 914); and that the accreted area, referred to as an island, was in fact not a separate island but was attached to the bank, such that one can walk or drive to the accreted area. (Tr. 915)

Joe Chatman, also an Agent with the Louisiana Department of Wildlife and Fisheries, gave similar testimony. (Tr. 915-921)

The testimony of all of these witnesses clearly shows exercise of acts of possession by the Louisiana riparians, to the exclusion of the Mississippi claimants, as well as the exercise of official acts of dominion and jurisdiction by Louisiana Law Enforcement Officials, Wildlife Agents and U.S. Fish and Wildlife (Joseph A. Oliveros). The testimony of the Louisiana witnesses clearly shows that possession or use of the accreted area at issue by the Mississippi claimants was totally unknown to the community on the Louisiana side of the river, as they had never seen anyone from Mississippi in the area. Consequently, testimony of "Jelly" Higgins, Charles Shelton, James B. Kelly, Ronnie Dotson, Robert Jarvis and "Horsefly" Higgins is not credible or worthy of belief. These

Mississippi witnesses testified very generally, gave no particular dates for the activities which they described and could not locate them specifically on a map. In short, their testimony should be given very little weight or should be rejected altogether.

There was no testimony that contradicted the official acts of the Louisiana officials over the accreted area, and none which indicated any recognition by Louisiana of the authority of Mississippi over the area. Moreover, taxes were paid by the Louisiana riparians on the accreted area (LA-37 and stipulation, page 4, *supra*), while the Mississippi claimants paid taxes on the precise geographic area occupied by Island No. 94 as of 1881 (Pl. Ex. 64, J.A. 75, page 4, *supra*). On this point, the Fifth Circuit did not recognize that the certificate of the Chancery Clerk of Issaquena County, Mississippi, (J.A. 75), covered the exact patent location of Island No. 94 (Section 27, T 11 N, R 9 W) and no more. Certainly, no land within the Louisiana land district is covered. At the location described in the tax certificate is found the large "new" island shown on LA-1A, as discussed on page 1 of this brief. Therefore, petitioners are erroneously trying to claim the accretion to the Louisiana bank by showing payment of taxes on a true island in the river pursuant to Pl. Ex. 64. Actually, the southern tip of the large new island barely touches the location of Island No. 94 as of 1881, as shown on LA-1A. Thus, petitioners have apparently been claiming both the large new island and the west bank accretion, thousands upon thousands of acres, by paying taxes on the former location of Island No. 94, 117.96 acres as of 1881. Petitioners have no evidence whatever of the assessment of taxes to them or payment of any taxes on

the Louisiana accretion – those lands are carried on the Louisiana tax rolls, as shown by LA-37 and the stipulation of all counsel, page 4, *supra*.

While there was some testimony of a Mississippi marijuana grower being turned over to Mississippi for prosecuting, as the Fifth Circuit held:

*** a few such isolated incidents do not constitute a "long-continued and uninterrupted assertion of dominion and jurisdiction over an area . . ." *Arkansas v. Tennessee*, 310 U.S. at 571 (1940)

937 F.2d at 253

It should also be noted with regard to the acquiescence issue that LA-16 and LA-16A show that the State of Louisiana, the Fifth Louisiana Levee District and the U. S. Geological Survey determined the boundary-thalweg to be east of Stack Island in the period of 1908-1911. That is the period of the maps, LA-16, a 1911 map, and LA-16A, a 1909 map, both of which clearly depict the downstream track of navigation at those times, based upon a 1908 base map. As shown by the legend information, this cooperative map project was based on a shoreline survey by "State Engineers Surveys", and on river topographical surveys by the "Mississippi River Commission Surveys".

One of the primary missions of the Mississippi River Commission is to determine the topography of the river and, for navigation purposes, the track of navigation. These exhibits show clearly that Louisiana is asserting dominion and jurisdiction over, through and beyond the area claimed by petitioners and is doing so with the active and official participation of the U.S. Government,

through two separate agencies. Petitioners expert witness, Smith, refused to discuss these maps in any detail.

This hardly supports the imperinent argument of petitioners that the Fifth Circuit "finessed the findings with respect to the prescription and acquiescence issue", at page 26 of their brief.

Once again, petitioners offer and argue much law, but steer clear of the detail of evidentiary facts which condemn their argument.

III. The Court Below Did Not Exceed The Proper Scope of Review Under Rule 52(a)

The district court misconstrued and misstated the facts of this case because of its wholesale adoption of the opinion testimony of the Petitioners' sole expert, Austin Smith, that an avulsion occurred in the Mississippi River during 1912 or 1913, causing the main channel to be "gradually enlarged avulsively" to the east, a complete contradiction in terms. There was no evidence to support this erroneous opinion, and the evidence of both petitioners and respondents totally refutes this claim. Particularly, LA-16 and LA-16A show that the downstream track of navigation was already in the east channel by at least 1908, completely refuting Smith's testimony that the floods of 1912-1913 caused a "gradual avulsion". In its eagerness to embrace petitioners' claim and theory of the case, the district court disregarded, solid conclusive pieces of evidence – the MRC report on the Stack Island dike project which was supported by engineering and hydrological data. The MRC report is self-explanatory and not subject to great conjecture. To misconstrue or

disregard the report, as did the district court, is clearly erroneous.

Almost every single finding of the trial court contained in its two opinions are at odds with some facts and evidence in the case. However, the trial court's conclusion that the island was eroding, accreting and migrating, and by 1954 had moved out from under any portion of the superimposed original island and therefore had disappeared is a correct finding.¹² Clearly, the island did move away from its 1881 location, eventually washed away and disappeared.¹³ As Louisiana's experts testified, alluvion from far upstream deposited against the west bank, creating bank accretion. This accretion is in no sense, factually or legally, the remnants of Stack Island.

¹² See bench opinion of June 23, 1989, page 16.

¹³ Under Mississippi Law, where an island increases by accretions, a riparian owner cannot claim any part extending beyond the boundaries of his own land. *Archer v. Southern Ry. Co. in Mississippi*, 114 Miss. 403, 75 So. 251 (1917). See also *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir.), rehearing denied, 580 F.2d 815 (5th Cir. 1978) wherein the Fifth Circuit held that under Mississippi Law, a riparian owner may not follow his accretions after they encroach upon the lands of another, and that it was error for the trial court, as here, to fail to explicate its decision in determining adverse possession under the standards of decisions of the Mississippi Supreme Court, at 887. In *McGill v. Thraser*, 221 Ky. 789, 299 S.W. 955 (1927) and *Nugent v. Mallory*, 145 Ky. 824, 141 S.W. 850 (1911), the courts have also held that the owner of an island under patent is without title to the island beyond his patent calls, precisely what petitioners are attempting hereby claiming accretion in another land district!

While this important set of facts is but one of many within the case, it became obvious to the Fifth Circuit that the district court did not have a grasp of or else totally disregarded the inherent contradictions and inconsistencies between petitioners' expert, Austin Smith, and other documentary and testimonial evidence which is a part of the record.

The Fifth Circuit correctly analyzed applicable rules of law pertaining to the rule of thalweg and its exceptions arising out of avulsive actions, as well as slow and gradual changes in the identity of the thalweg, citing *Iowa v. Illinois*, 147 U.S. 1 (1893); *Louisiana v. Mississippi*, 466 U.S. 96 (1984); and the island rule arising out of *Missouri v. Kentucky*, 11 Wall. 395 (1870), and resulting in *Hogue v. Stricker Land & Timber Co.*, 69 F.2d 167 (5th Cir.), cert. denied, 293 U.S. 591 (1934). After analyzing the applicable legal principles, the court applied a two-step analysis to resolve factual disputes in the case. The Fifth Circuit then stated that:

We conduct this inquiry against the backdrop of the clearly erroneous standard, giving due regard to the trial judge's assessments of the witnesses' credibility. See Fed. Rule of Civ. Pro. 52(a).

937 F.2d at 250, 251

At page 27 of petitioners' brief, it is stated that the Fifth Circuit "misunderstood" the clearly erroneous standard, although as cited above, the Fifth Circuit conducted its inquiry against the backdrop of the clearly erroneous standard. The Fifth Circuit analysis of the evidence in the record, as contrasted to that relied upon by the district court, plainly shows that the clearly erroneous standard

was followed. Petitioners do not want this to be so and seek to argue around the lower court's analysis.

For instance, the Fifth Circuit opinion states, in part, that " * * * it is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinion". 937 F.2d at 251. The Fifth Circuit then goes on to discuss the Congressionally-funded MRC construction project, explained by respondents' witnesses, Harrison and Easterly, and offered into evidence as LA-18A. (J.A. 143)

The opinion also finds that the district court ignored hydrographic data contained in the study as well as the textual explanation of the project, describing the location of the east chute channel as the "main channel" at the time of the December 1881 survey.

Petitioners argue that because the Fifth Circuit cited *Staufer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967), that analysis under the clearly erroneous standard is made "inherently suspect". Instead, petitioners prefer the "new precision" of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), holding, essentially, that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. 470 U.S. at 574. The Fifth Circuit found that the evidence relied upon by the district court did not support its conclusions.

Petitioners suggest at page 27 of their brief that the Fifth Circuit is stating that it has weighed the evidence differently than the district court and such is not enough for reversal.

Actually, as referred to above, the Fifth Circuit stated, in part, that:

- (1) It is apparent that Smith disregarded the only conclusive pieces of evidence in formulating his opinions (937 F.2d at 251);
- (2) The district court ignored the language of the MRC report and the hydrographic data contained within it (937 F.2d at 251);
- (3) The evidence relied upon by Mississippi, Smith, and ultimately the district court simply does not contain the type of data necessary to support a conclusion contrary to the official government report (937 F.2d at 251); and
- (4) After reviewing the facts upon which Smith and the court relied, stated that the district court clearly erred in relying upon evidence, that regardless of its veracity, could not support its finding (937 F.2d at 251).

This clearly states the court's definite and firm conviction that a mistake has been committed by the district court and that its finding was clearly erroneous. The Fifth Circuit is clearly not duplicating the role of the lower court, but has found that there is no evidence to support its decision as explicitly articulated at pages 251 and 252 of the appellate decision. Again, the Fifth Circuit is not merely saying that there are two permissible views of the evidence or that there is some evidence to support the district court decision, but that both Smith and the district court disregarded the only conclusive evidence, resulting in an opinion based upon evidence which is absent the data necessary to refute an official government report entered into the Congressional Record. For the

Fifth Circuit to have held otherwise, it, too, would have had to disregard the MRC report.

At page 35 of petitioner's brief, it is stated that the trial court made two conclusive, ultimate findings of fact that control the case, and that neither is vulnerable under the clearly erroneous standard. One conclusion is that the trial court found the "land mass" lies in the State of Mississippi, and the other is that if the land be not in Mississippi because of the thalweg-boundary, then it is in Mississippi under the doctrine of acquiescence.

Contrary to petitioner's assertions, these two conclusions are absolutely vulnerable in that there is absolutely no evidence to support them. It is not just that there might be two permissible views of the evidence, but rather that it is not reasonably conceivable that these findings can be correct in any regard. The first finding concerning the land mass implies that a 117.96 acre island on one side of the river has floated to the other side of the river to a different geographic location outside the patent calls and become assimilated into the bank as more than 4000 acres.¹⁴ The second finding not only implies, but mandates that the State of Mississippi, as a sovereign, has taken some action to exercise dominion and jurisdiction over the accreted area on the west bank, and there is no evidence whatsoever to support this. Moreover, the greater volume of evidence shows just the opposite: that Louisiana officials exercised full and unchallenged dominion and jurisdiction for land sales, property transfers, taxation, police authority and wildlife and fisheries

¹⁴ Bench opinion of June 23, 1989, page 16.

regulation for all known periods of time. The sole exception: a marijuana grower was said, by hearsay testimony of Mississippi witnesses, to have been turned over on one occasion to a Mississippi authority. This single act, even if actually true, does not lead to sovereign acquiescence by Louisiana. The great bulk of the evidence is squarely against this proposition.

As discussed above, the certificate of the Chancery Clerk of Issaquena County specifically stated that any taxes paid by petitioners were for lands located on the east bank of the river within the Choctaw Land District in Mississippi, that being the historic location of Island No. 94. Not one single witness for petitioners ever testified that he thought that he was paying taxes on land accreted to the west bank within the Red River Land District of Louisiana, nor were any documents introduced to this effect.

The record as a whole does not contain evidence to support the findings of the district court. The preponderance of the evidence and the greater authority of the evidence submitted by respondents is clearly against petitioners. No reasonable view of the evidence would lead to the conclusion that the ultimate findings of fact of the district court was a "permissible view" of the evidence. The decision of the district court was plainly wrong and is clearly erroneous.

IV. Jurisdiction Over Louisiana's Third Party Complaint Against Mississippi

This section addresses the question formulated by the Court in its order of March 23, 1992, granting certiorari, as follows:

Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi?

Respondents agree with the three issues identified by petitioners arising out of the jurisdictional question, at page 36 of their brief, and will treat each briefly below. Petitioners have also provided a detailed summary of respondents' efforts to have this court assume original jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. 1251(a) in their statement of the case, pages 2 et seq. It is also pointed out that respondents' petition for rehearing of the Louisiana motion to file complaint was denied by the Court by order of February 27, 1989. Thus, the Court has had an opportunity to consider the jurisdictional questions presented on two prior occasions.

With regard to the several different issues raised by the jurisdictional question, respondents comment on each, as follows:

- (1) Does the grant to this Court, in 28 U.S.C. 1251(a), of "original and exclusive jurisdiction of all controversies between two or more States" preclude all other courts from taking jurisdiction of a controversy between two states?

The simple answer is that whatever counsel may think and whatever the commentators may think, it is the law of this case and the law of this Court that it has the discretion to determine whether to invoke its original jurisdiction in suits between states pursuant to Section 1251(a), and it can and has refused leave to file if the issues are subject to resolution in an appropriate forum.

Petitioners have cited the appropriate cases for this proposition, including *Arizona v. New Mexico*, 425 U.S. 794 (1976), also cited by Justices White, Stevens and Scalia in their dissent to the denial of Louisiana's motion to file a bill of complaint in this case. *Louisiana v. Mississippi*, 488 U.S. 990 (1988).

Consequently, the Court must have concluded at the time of its denial of the Louisiana motion that there was an appropriate alternative forum in which this dispute could be resolved, that forum being the District Court for the Southern District of Mississippi, the decision of which is now here on certiorari. This, however, does not suggest that the decision on the motion establishes that the district court properly asserted jurisdiction over the dispute between the two states, merely that the majority thought that the district court was at least another forum where the case could be heard. As suggested at page 44 below, the Court may decide to re-visit this issue with a view toward exercising original jurisdiction less sparingly in controversies between states where the issues are not clearly subject to resolution by an alternative forum.

- (2) Was Louisiana's third-party claim against Mississippi within the jurisdiction of the district court?

The district court had jurisdiction over the original suit between the private parties on the basis of diversity of citizenship, and also had jurisdiction over Louisiana's claim in intervention and third-party complaint against Mississippi, provided that it could draw a boundary without affecting title to land in another state. *Durfee v. Duke*, 375 U.S. 106, 115 (1963).

As to federal-question jurisdiction, Louisiana relied upon 28 U.S.C. 1331, asserting that its rights arise under the Constitution of the United States, the Act of April 6, 1812, admitting Louisiana into the Union, and the Treaty of Peace, "Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80", between the United States and Great Britain, all proper bases of federal-question jurisdiction.

Louisiana also claimed intervention as a matter of right, which is correct under Rule 24(a)(2) of the Federal Rules of Civil Procedure, when there is a claim of an interest relating to property, as here.

Consequently, Louisiana's intervention and third-party complaint were properly before the Court under the cited statute and rule, as set forth in the motion for intervention in the district court (J.A. 5). Petitioners thoroughly and correctly analyze these jurisdictional issues, to this point.

- (3) If the land in question is, as the Fifth Circuit found, in Louisiana, does that mean that the district court lacked power to exercise jurisdiction over it?

This issue was discussed with the district court at the outset, argued in Louisiana's motion for separate trial of the interstate boundary issue¹⁵, raised at page 2 of the

¹⁵ J.A. 34. Louisiana argued in its memorandum in support of its motion for separate trial of the interstate boundary issue that: "The determination of the legal boundary between the states by the Court will determine the limits of the jurisdiction of the Court, and may result in a determination that the ownership of the property in question is outside the limits of the Court's jurisdiction."

petition for rehearing of Louisiana's motion to file complaint, and at page 9 of its brief in support of petition for rehearing. Justices White, Stevens, and Scalia also noticed this issue in the dissent from the Court's denial of leave to file a bill of complaint. 488 U.S. at 991.

Clearly, there is a problem with a district court in one state making findings which directly affect title to land in other states. As suggested to the district court, in order for it to take jurisdiction of the matter, it would be compelled to pre-judge the extent of its jurisdiction prior to hearing the first witness or seeing the first item of evidence. That is, the district court would be called upon in the case of a river boundary dispute such as this to ascertain the limits of its jurisdiction vis-a-vis the interstate boundary in order to determine whether the accretion to the west bank of the river was within its jurisdiction in the first instance.

The district court had no difficulty with this dilemma and held that in the event it was wrong in its conclusion that the boundary thalweg lay west of Island No. 94 in the year that it was patented, alternatively, it would conclude that the disputed lands belonged to Mississippi under the doctrine of acquiescence, as noted by the Fifth Circuit. 937 F.2d at 253. Parenthetically, in order to even proceed with the case, the district court was required to determine that accretions to the west bank of the Mississippi River were within the territorial boundaries of the

State of Mississippi and, thus, within the jurisdiction of the court to hear and determine.¹⁶

On this point, the law of this Court is quite clear "that courts of one State are completely without jurisdiction directly to affect title to land in other States." *Durfee v. Duke*, 375 U.S. 106, 115 (1963). Petitioners, however, have constructed a circular argument at page 47 of their brief, contending that although the literal language of *Durfee* supports such a result, a district court would therefore be without jurisdiction to affect title to land in other states, and it should not be the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it.

Petitioners' argument props itself up by arguing that a court achieves full jurisdiction by presuming to exercise jurisdiction, regardless of the nature of the dispute or the extra-territorial location of the land, as here. This cannot be correct.

It is argued that if the district court or a higher court found that the land was on the Louisiana side of the boundary, then the Mississippi district court would be without jurisdiction and its judgment would be a nullity. However, this ignores the fact that if the district court in

¹⁶ The district court decided the interstate boundary issue on Phase I of the bifurcated trial without hearing all of the witnesses and evidence, making it difficult for Louisiana counsel in Phase II to question witnesses concerning the boundary, possession and acquiescence. (Tr. 871-872) Moreover, the district court would not allow the introduction of LA-83, showing legal and historic title of a Louisiana resident to the accretion on the west bank claimed by petitioners. (Tr. 879)

this case had properly found the land to be on the Louisiana side of the boundary, then such land would be subject only to the disposition of Louisiana courts. The Mississippi court would not then have made an award of the land to petitioners. If, on the other hand, a district court decides in favor of local residents, but is wrong and the decision is reversed on appeal, the disposition of the extra-territorial land and the proper location of the boundary is a matter for the higher court. A reversal on appeal does not override the rule of jurisdictional finality, but is a part of the process, simply resulting in a final and definitive decision as to the location of the thalweg-boundary, the accreted lands and the newly formed island in the river adjacent to the location of original Island No. 94.

In this regard it should be remembered that in *Durfee*, the issue was title to the land as between parties to the litigation and did not affect the states with respect to the location of the boundary between them, as is now before the court in this case.

In the current case, the district court judgment finds that the accretion to the west bank of the Mississippi River at Lake Providence is actually "Stack Island" in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion."¹⁷ Based upon this erroneous finding, the district court awarded these accreted lands to petitioners.

¹⁷ Bench opinion of June 23, 1989, page 17. This implies that the district court has authority to construct a new property description, although it conflicts with existing ownership(s) in the geographic location, Louisiana.

Had the district court concluded that these accreted lands actually lie in Louisiana, based upon a correct analysis of the location of the thalweg-boundary, it should have denied the claims of petitioners and made no award of the lands.

Therefore, the rule of *Durfee* concerning the jurisdiction to affect title to land in other states and the rule of jurisdictional finality are given support and not negated by a finding that the district court made an erroneous decision or lacked power to exercise jurisdiction over land in Louisiana located west of a proper thalweg-boundary.

It is submitted that in this case the district court lacked power to exercise jurisdiction over the land in question.

It seems to this writer that the clear language of 28 U.S.C. 1251(a), not to mention Article III, Section 2, Clause 2 of the Constitution, mandates this Court to hear and determine controversies of this type between states and that no other court has such authority. It would seem that the jurisdiction in this area is, indeed, "original and exclusive" for the Court, so as to avoid a "meandering through the Courts", as alluded to by the Fifth Circuit. Heretofore, of course, the Court has imposed prudential and equitable limitations upon the exercise of its original jurisdiction, making it obligatory only in appropriate cases. The difficulty, of course, is in determining which controversies are truly suitable for resolution in an alternative forum.

Initially, a majority of this Court felt that there was a suitable alternative forum, over the dissent of three Justices who argued to the contrary. Now, following a trial and appeal, it appears that the issues were not clearly subject to resolution in the district court. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 799 (1992). As a consequence, the matter is now before the Court for the third time.

Perhaps boundary cases between states are one type of controversy where, ultimately, final adjudication and relief may be had only before this Court? This should be the rule, for surely the "seriousness and dignity of the claim" between states as concerns their sovereign boundaries justifies exercise by the Court of its original jurisdiction. *Id.*, 112 S.Ct. 798.

It is submitted that it would be in the interest of judicial economy for the overall federal system for the Court to more frequently invoke its original jurisdiction in matters of this type, assigning the trial of the case to a special master, and thus avoiding multiple motions to file bills of complaint, trials in the lower courts, the obligatory appeals, and, finally, the petition for writ of certiorari by one of the parties. This long process surely burdens the overall federal judicial process and involves, finally, the precious time of this Court at the conclusion.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed. The lower court correctly found from the entire record of the case that the district court had erred in concluding that the boundary thalweg lay west of Island No. 94 in

the year that it was patented, improperly applied the doctrine of acquiescence to its factual findings and failed to properly locate the boundary thalweg in the east channel where it lay at the time of patent in 1881. There is no reason to remand to the trial court for findings with respect to the location of the boundary-thalweg on the dates of state sovereignty, since all available evidence is now before the Court. While petitioners failed to submit evidence for the times of sovereignty, Island No. 94 did not come into existence until 1879, just prior to the U.S. patent of the island in 1888, and this is the relevant time for determination of the boundary. A remand of the case would simply result in a new trial and appeals, ultimately bringing the case back to this Court.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1992

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Petitioners,

v.

THE STATE OF LOUISIANA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

There is very little disagreement between the parties¹ regarding the law. With the exception of the jurisdiction question, nothing in Louisiana's brief takes issue with the law set forth by Mississippi. Instead, the disagreement centers on the facts – specifically (1) whether the boundary thalweg ran to the west or to the east of Stack Island; and (2) whether Mississippi exercised sovereignty over Stack Island and Louisiana failed to do so. After hearing and weighing the evidence, the trial judge entered express findings on those issues in favor of Mississippi.

¹ For ease of reference, the petitioners are referred to collectively as "Mississippi" and the respondents are referred to collectively as "Louisiana."

Given the nature and posture of the dispute, one would expect that Louisiana's brief would carefully analyze the district court's findings in light of the clearly-erroneous standard of Rule 52. That, however, has not been done. Louisiana has said almost nothing to indicate why this Court should conclude that the trial judge's account of the evidence was not "plausible"; nothing has been said that demonstrates that the trial judge adopted an "impermissible view" of the evidence. This is the burden that Louisiana must meet. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

Rather than focus on the propriety of the district court's findings under Rule 52, Louisiana undertakes to re-argue and re-try the lawsuit. Louisiana's brief presents a maelstrom of factual assertions, some of which even go so far as to recite "evidence" that is not found in the record even though it was referenced in the pretrial order. In every circumstance, Louisiana's interpretation of the evidence is a matter of dispute between the parties. In no circumstance is Louisiana's interpretation of record evidence or of extraneous matter uncontroverted.

This type of rehashing of the evidence validates the wisdom and importance of assigning the fact-finding function to the trial court. The nature of the record analyses conducted by the Fifth Circuit and renewed here by Louisiana simply duplicates what the trial judge has already done. The factual conclusions made by the Fifth Circuit and re-urged here by Louisiana are conclusions with which the trier of fact clearly could disagree and clearly has disagreed. Consequently, under Rule 52 and this Court's decisions in *Anderson* and *Amadeo*, the decision of the Fifth Circuit should be reversed and judgment should be rendered consistent with the findings and judgment of the district court.

I. LOUISIANA'S TREATMENT OF FACTUAL MATTERS IS BOTH INACCURATE AND INAPPROPRIATE

With one exception, the disputed issues in this appeal are about the facts. Therefore, it is important to have an accurate understanding of the district court's fact findings and of the evidence in the record. Louisiana's brief contains inaccuracies in that regard, and Mississippi believes that it is important to set the record straight at the outset.²

A. Louisiana's misattribution of the "disappearing island theory"

Louisiana attributes findings to the district court that the district court never made. On page 1 of its brief, and again on pages 3 and 32, Louisiana contends that the district court found that Stack Island had "washed away entirely" or "disappeared." In fact, the district court never made any such finding. The reference cited by Louisiana is to the portion of the trial judge's opinion that stated Louisiana's position. The truth of the matter is that the district court rejected Louisiana's position and made exactly the opposite finding:

The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. . . .

The Court concludes by a preponderance of the evidence that the land mass which now lies

² Section I does not purport to be a complete listing of the factual errors in Louisiana's brief but is, instead, a sample of the principal inaccuracies.

against the Louisiana bank and which is the portion claimed by the Plaintiffs, is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion. . . .

. . . [T]here is no testimony whatsoever that Stack Island disappeared. The Court simply thinks that the Louisiana parties' position that Stack Island disappeared because it moved out from under the location of the original Stack Island is not well taken. . . .

(Pet. for Cert. App. 32a-33a)

The notion that Stack Island "disappeared" was invented by Louisiana and was expressly rejected by the trial judge. Contrary to Louisiana's statements, there is no finding that Stack Island ever "washed away entirely."

B. Louisiana's mischaracterization of record evidence

In several instances, Louisiana mischaracterizes what the record shows.³ For example, at page 18 of its brief, Louisiana asserts that the map set forth at J.A. 163 shows "the tracks of navigation as of December, 1881." The truth of the matter is that the "track of navigation" reflected on that map was drawn in by Louisiana and was not on the original map.

In a related misstatement, Louisiana asserts that the MRC report "described in detail the location of the main

³ Louisiana's improper treatment of factual matters is not limited to erroneous characterizations of the record. At pages 10 and 11 of its brief, Louisiana also attempts to interject matters that were never placed in evidence. The extraneous matters were referenced in the pretrial order and could, presumably, have been offered into evidence, but Louisiana chose not to do so. It is improper for Louisiana to attempt to interject such extraneous matter into this appeal.

navigation channel at Stack Island in 1881 as being in the east chute channel." (La. Br. 18) The MRC report states no such thing. It was dated November 15, 1883 and covers a time period from December 1, 1882 to November 1, 1883. (See J.A. 146, 147.) The MRC report does not "describe" the location of the thalweg in 1881. Locating the thalweg was not the purpose of the MRC report, and 1881 was not the time period on which the report focused. As will be discussed in more detail in Section II, Louisiana reads far more into the MRC report than can be justified.⁴

C. Louisiana's misstatement of the issues before the district court

Finally, Louisiana's brief conveys a misleading impression of what was considered and decided at trial. In several places, the brief refers to a "new island" or to "separate geographic locations." On page 1, Louisiana charges that the district court "did not discuss the 'new' island." On page 2, Louisiana states that the "trial court also avoided discussing the fact that there are two separate geographic locations at issue." The truth of the matter is that the so-called "new island" and the "separate geographic locations" were not at issue in this case.

Louisiana first came up with these ideas well into the lawsuit. They were initially discussed at a pretrial conference several months before trial and then again just as the trial was about to begin. At that time, the district court clearly ruled, and all counsel clearly agreed, that only Stack Island was at issue and that the so-called "new

⁴ Louisiana's characterization of the evidence relating to the Doctrine of Acquiescence also contains numerous inaccuracies. That evidence is discussed in Section IV below.

island" was not the subject of the lawsuit. (Tr. 21-33)⁵ Everyone has always understood the subject of the litigation. Consequently, the attempt to create confusion by interjecting the notion of a "new island" or "different geographic locations" is improper and should be rejected.

II. THE DISTRICT COURT'S FACT FINDINGS REGARDING THE LOCATION OF THE BOUNDARY THALWEG WERE NOT CLEARLY ERRONEOUS

Louisiana employs essentially two devices in its attempt to justify the Fifth Circuit's rejection of the trial judge's fact findings. First, Louisiana argues that Mississippi's evidence did not contain the "type of data" necessary to support the district court's findings. Second, it is argued that it was "clear error" for the district court to disregard Louisiana's interpretation of the MRC report. As will be shown below, neither argument has any merit.

A. Mississippi's evidence properly supported the district court's fact findings regarding the location of the boundary thalweg

Louisiana's initial argument – that Mississippi's evidence did not contain the "proper type of data" – is completely incorrect. It should be noted that Louisiana

⁵ In a related matter, Louisiana makes reference to "accretionary features" and contends that Mississippi's claim relates to a "bank accretion." (See La. Br. 1, 2.) This misstatement of Mississippi's position should be rejected. Mississippi's claim does not relate to an accretion but, instead, relates to Stack Island. It has always been Mississippi's position that Stack Island did not accrete to the Louisiana bank. Rather, the river channel separating the island from Louisiana gradually filled in with sand and other alluvium. (See J.A. 47-48; 55-56; 61-62; 99.)

did not provide any explanation or offer any legal authority to indicate why Mississippi's evidence is not of the "proper type."

Identifying the location of the thalweg is a fact-bound inquiry that consists of determining the normal route used for downstream navigation. There is no disagreement among the parties in this regard, and the nature of that inquiry has been clearly described by this Court.

It appears to us, as it did to the Master, to be a matter of evidence as to the course commonly taken downstream by vessels navigating the particular reach of the river.

Louisiana v. Mississippi, 466 U.S. 96, 101 (1984). Given the uncomplicated nature of the inquiry, Louisiana's attempt to create arbitrary distinctions between "types" of probative evidence should be rejected.

Mississippi's evidence is highly probative of the boundary between Mississippi and Louisiana, as is reflected in the following documentary evidence.

Exhibits P-1 and P-2
(Tr. 286-87; J.A. 127-28)

These are United States survey maps of Mississippi and Louisiana in the vicinity of Stack Island. The survey maps were prepared in 1826-27 and 1828-29, respectively. P-1 shows Stack Island as Mississippi land. By contrast, Stack Island does not appear on P-2, which is the corresponding Louisiana map. Taken together, Exhibits P-1 and P-2 clearly indicate that the surveyors understood the state boundary to run on the west side of Stack Island.

Exhibits P-3, P-4, and P-5
(Tr. 293, 295, 299; J.A. 129-31)

Exhibit P-3 is an 1867 map of the eastern bank of the river in the vicinity of Stack Island and depicts Stack Island as lying east of the main channel. Exhibit P-4 is a reconnaissance map made in 1874 by the U.S. Army Corps of Engineers. It also shows Stack Island (or Island No. 94) east of the main channel, separated from the Mississippi mainland by a narrow chute channel. Louisiana attempts to dismiss Exhibit P-4 by stating that it was merely a "reconnaissance survey" made from the boat on which "Major Suter was riding downstream." (La. Br. 12) But that is the point – the downstream navigation channel is precisely what is at issue. Exhibit P-4 is clearly probative.

Exhibit P-5 is an 1879 map made as a blueprint for the work of the Mississippi River Commission to narrow the river channel. Like the other exhibits, Exhibit P-5 shows Stack Island lying east of the main navigation channel.

Exhibit P-7 (Tr. 307; J.A. 132)

This is a United States survey map done of Stack Island in August 1881. On the west side of Stack Island, the surveyor noted a "good deep channel" with "no bottom." On the east side of the island, the surveyor noted a "depth of 12 feet" in the chute with "shoals" at the south end of the chute.

Exhibit P-8 (Tr. 313; J.A. 133)

Exhibit P-8 is a shoreline survey prepared in October and November of 1881. It was prepared by the U.S. Army Corps of Engineers for the Mississippi River Commission. P-8 shows the government navigation lights, which clearly indicate that the main downstream navigation channel runs to the west of Stack Island. Exhibit P-8

confirms the United States survey map (Exhibit P-7) prepared several months earlier.

Clearly, the foregoing maps reflect the type of "data" from which a determination can be made regarding the location of the boundary thalweg. Based on those maps (and the other substantial evidence in the record), the trial judge was entitled to find that the normal route for downstream navigation passed to the west of Stack Island.

Louisiana has provided nothing in support of its naked assertion that Mississippi's evidence constitutes the "wrong kind of data." Louisiana has also failed to point to any legal authority that would cast any doubt regarding the propriety of Mississippi's evidence. Consequently, Louisiana's insupportable assertions regarding the "right type" of data should be rejected. Based on the entire record, including the evidence brought forward by Mississippi, there is nothing "impermissible" or "implausible" about the district court's finding that the main downstream navigation channel ran to the west of Stack Island.

B. It was not "clear error" for the district court to reject Louisiana's interpretation of the MRC report

Louisiana's second proffered justification for rejecting the trial judge's findings centers on the MRC report. Louisiana argues that to "misconstrue or disregard the report, as did the district court, is clearly erroneous." (La. Br. 31-32) Essentially, Louisiana argues that the trial judge committed clear error solely because he did not adopt Louisiana's interpretation of the MRC report. Louisiana's interpretation, however, is far from the only one. The report is not as conclusive as Louisiana chooses to believe, and there is nothing in the report that would

have compelled the district court to make certain findings. The trial judge carefully reviewed the MRC report, considered Louisiana's interpretation, and rejected that interpretation. That does not constitute clear error.

The MRC report is a series of annual reports prepared by the Mississippi River Commission to describe its work in narrowing the river channel. Neither the work nor the report was undertaken for the purpose of analyzing or identifying the boundary thalweg. In point of fact, the report does not even purport to conduct any such analysis or to reach any such conclusion. Instead, the MRC report simply recounts certain efforts to improve navigation on the river. Erosion control in the Stack Island area was not originally part of the Mississippi River Commission's work. It was not until after 1881 and during the flood of 1882 that the Commission made it an objective to reduce erosion on the Mississippi bank east of Stack Island.

It is also worth noting that the MRC report does not relate to the time the original patent survey for Stack Island was prepared in August 1881. The report is dated November 15, 1883 and describes work undertaken after December 1, 1882. The report is silent regarding the location of the boundary thalweg in August 1881 and is silent regarding the boundary thalweg location at all prior periods, including the time Louisiana was admitted to the Union or the time Stack Island was formed. The MRC report, therefore, is far from definitive on the boundary issue.

Read in light of its purpose and the time period involved, there is clearly nothing in the MRC report that would require the district court to conclude that the boundary thalweg ran on the east side of Stack Island. Louisiana chooses to interpret the report in that fashion,

but its interpretation is neither compelled nor suggested by the report itself.

Louisiana suggests that the district court completely "ignored" or "disregarded" the MRC report. The district court's opinion unequivocally rejects any such notion. The opinion reflects a detailed analysis of the evidence (see Pet. for Cert. App. 26a-30a) and specifically indicates that the MRC report was considered.

The Court is thus faced with conflicting evidence as to what the normal course of downstream navigation was in 1881 on this stretch of the river. The Court finds a preponderance of the evidence favors the Plaintiffs' theories for the following reasons. . . .

The Court reads the [MRC] report and these maps to indicate that the river certainly is trying to switch its course into the east chute but not necessarily that it had by 1881. The Court, accordingly, rules that as of the date of the survey [1881] that the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island.

(Pet. for Cert. App. 29a, 30a) The MRC report was not ignored or disregarded. The report was carefully considered and weighed together with the other evidence. Contrary to Louisiana's protestations, the report simply does not support Louisiana's claim.

Louisiana's interpretation of the MRC reports did not compel the rejection of the other evidentiary matter in the record. In the language of *Anderson v. City of Bessemer City*, there were different permissible views of the evidence. The trial judge considered all the evidence and made his findings in accordance with one of the permissible views. The mere fact that his findings did not track Louisiana's interpretation does not constitute clear error.

III. THE AUGUST 1881 PATENT DATE WAS NOT THE EXCLUSIVE FOCUS FOR DETERMINING THE BOUNDARY THALWEG

Louisiana argues that Mississippi has changed its theory of the case – specifically that the applicable date for locating the boundary thalweg is the time of sovereignty or island formation rather than the August 1881 effective date of the patent. (See La. Br. 5.) This is simply not true. Mississippi's position has remained constant throughout.⁶ This argument is a red herring.

While considerable attention was paid to the location of the navigation channel at the time of the patent in 1881, that date was not the exclusive focus. As discussed in Section II(A), Mississippi introduced a significant body of evidence predating the 1881 patent. (See Exhibits P-1, P-2, P-3, P-4, and P-5; J.A. 127-131.) Furthermore, Mississippi's proposed findings of fact expressly reference the time of island formation.

Further, from the time of the formation of Stack Island, the island and its accretions have been bounded on the West by the Mississippi River channel thalweg-interstate boundary (Mississippi-Louisiana), and bounded on the East by the chute channel, which has a bed which lies entirely within Mississippi.

⁶ Building on its "changed-theory" argument, Louisiana undertakes to recite its interpretation of various maps and documents that were never introduced into evidence. (See La. Br. 10-11.) Because those matters are not of record, Louisiana's "interpretation" cannot be checked by this Court for accuracy. Mississippi rejects Louisiana's interpretation and also disputes the assertion that Louisiana's failure to offer this "evidence" was occasioned by any so-called change in theory. Instead, the failure to bring that evidence forward was the product of Louisiana's trial strategy.

(J.A. 47, 55, 61) Clearly, the "boundary thalweg" reference is to the time that Stack Island was formed and is not limited to the 1881 patent. Consequently, Louisiana's contention that the exclusive focus was on 1881 is not well taken.

Louisiana's argument misses the point and ignores the unequivocal holdings of this Court. With regard to an island, the time for determining the location of a boundary thalweg is either the date of sovereignty or the date of the island's formation, whichever is later. See *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 401 (1871); *Mississippi v. Arkansas*, 415 U.S. 289 (1974); *Kansas v. Missouri*, 322 U.S. 213, 229 (1944); *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890). This Court has established the applicable date for boundary determination, and those holdings control.⁷

Even if, as Louisiana suggests, the proper focal point were August 1881, the district court expressly found that the boundary thalweg was west of Stack Island at that time.

The Court, accordingly, rules that as of the date of the survey [August 1881] that the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island. Therefore, the Court concludes that at that time Stack Island was a part of the State of Mississippi rather than a part of the State of Louisiana.

⁷ Louisiana and Mississippi were admitted to the Union in 1812 and 1817, respectively. The earliest evidence in the record regarding the existence and location of Stack Island is found in the circa 1826 township surveys – Mississippi's Exhibits P-1 and P-2. (J.A. 127, 128) That evidence indicates that Stack Island was considered Mississippi land and that the boundary thalweg was west of Stack Island at that time.

(Pet. for Cert. App. 30a) The trial judge's finding controls unless, in the language of *Anderson* and *Amadeo*, the finding is based on an "impermissible" or "implausible" view of the evidence. As shown in Section II, this is not the case.

Louisiana again employs its "disappearing island theory," arguing that, between the dates of the township surveys in 1826-29 and the effective date of the patent in August 1881, Stack Island "disappeared" and "re-emerged." In that fashion, Louisiana hopes to avoid this Court's controlling holdings regarding the applicable date for locating the boundary thalweg. However, there are no findings to support Louisiana's "disappearing island theory." Louisiana's unsubstantiated argument should be rejected.

As discussed in Mississippi's initial brief, the district court did not enter an express finding regarding the location of the boundary thalweg prior to 1881. It is clear, however, that the time of island formation or of admission to the Union is the appropriate focal point and that all record evidence supports the conclusion that the boundary thalweg ran west of Stack Island at that time.

IV. THE DISTRICT COURT DID NOT MISAPPLY THE DOCTRINE OF ACQUIESCENCE

In its treatment of the Doctrine of Acquiescence, Louisiana again confuses the issues. The record evidence is inaccurately stated and the limitations on appellate review of facts are conveniently discarded.

The Doctrine of Acquiescence establishes state boundaries in accordance with the acts of dominion, control, and sovereignty by one state, coupled with the corresponding failure of the adjoining state to exercise dominion or jurisdiction. See *Arkansas v. Tennessee*, 310

U.S. 563 (1940); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Louisiana v. Mississippi*, 202 U.S. 1 (1906). The determination whether the Doctrine of Acquiescence is applicable is a purely factual determination. See *Kansas v. Missouri*, 322 U.S. 213, 220-27 (1944); *Arkansas v. Tennessee*, 310 U.S. at 567.

The district court heard evidence relating to the Doctrine of Acquiescence and made fact findings in that regard.

The Court, accordingly, concludes . . . that Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by the State of Mississippi and that it is now in the State of Mississippi. . . . [T]he period of exclusive jurisdiction by the State of Mississippi has run from 1881 to the present time.

Accordingly, the Court finds that if the land be not in the State of Mississippi because of the thalweg boundary that the land is in the State of Mississippi under the doctrine of acquiescence.

(Pet. for Cert. App. 40a-41a)

The Fifth Circuit's improper treatment of the district court's findings regarding acquiescence is discussed at pages 17 through 26 of Mississippi's initial brief, and that discussion will not be repeated here. The tactics of confusion that are employed by Louisiana in its brief, however, require comment.

First, as it has done with other issues, Louisiana recounts its version of the "evidence" as if to invite the Court to re-weigh the evidence and re-try the case. This invitation to violate the clearly-erroneous standard is reflected in Louisiana's suggested treatment of the testimony of Mississippi's witnesses, which Louisiana maintains "is not credible or worthy of belief" and "should be given very little weight or should be rejected altogether."

(La. Br. 28, 29) The approach taken by Louisiana has been emphatically rejected by this Court. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982) ("Determining the weight and credibility of the evidence is the special province of the trier of fact.").

The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

Anderson, 470 U.S. at 573. On appeal, the focus is not on "weight" or on "credibility." Those issues are reserved for the fact finder. The issue on appeal is whether the district court's finding, taken in view of the entire record, is a "permissible" or a "plausible" one. Louisiana has apparently lost sight of that fundamental rule.

Louisiana's second attempt to confuse the issues is centered on the recitation of actions supposedly undertaken by Louisiana to exercise dominion over Stack Island. This recitation is found on pages 26-28 of Louisiana's brief. It should be noted that the referenced testimony was not before the district court at the time the acquiescence issue was presented for decision.⁸ At Louisiana's request, the proceedings in the district court were bifurcated and the boundary-related issues (the Rule of the Thalweg; the Doctrine of Acquiescence) were decided in the initial phase of the trial. (See J.A. 31-39.) The referenced testimony was not brought forward until after

⁸ With the exception of testimony by Mr. House, all the testimony discussed in this regard was elicited during the second phase of the trial.

the district court issued its decision regarding the boundary between Louisiana and Mississippi. Louisiana's testimony was vague, both with regard to the location at which the actions took place (Stack Island as opposed to the "accretion/accreted area") and with regard to the specific time period involved. Finally, it should be noted that all of the actions proffered by Louisiana occurred in the recent past, long after acquiescence. Nothing in Louisiana's brief creates any doubt regarding the trial judge's finding on acquiescence. That finding cannot be shown to be clearly erroneous.

Nowhere is the attempt to sow confusion more pronounced than in connection with taxation. Louisiana is careful to use the terms "accretion" or "accreted area" rather than "Stack Island." The choice of terms is neither accidental nor innocent. Instead, it is misleading. By careful use of the term "accreted area," Louisiana seeks to convey the impression that Louisiana has levied and collected taxes on Stack Island. There is, however, absolutely no evidence in the record to support that claim. Louisiana's reference to the stipulation of counsel misstates and distorts that stipulation. The stipulation simply reflects that Louisiana collected taxes on the Louisiana mainland, which is distinct from Stack Island. (See Tr. 827-31; J.A. 114-18.) Mississippi has continuously levied and collected taxes on Stack Island. In 1927, 1930, and 1932, Mississippi enforced its tax assessment through foreclosure of the island. (Tr. 211-13, 218; J.A. 75)

As discussed at pages 21-24 of Mississippi's initial brief, Mississippi has continuously exercised dominion and jurisdiction over Stack Island. By contrast, Louisiana has not done so. The district court entered express findings in this regard. The Fifth Circuit's disregard of those findings and its *de novo* treatment of issues relating to the

Doctrine of Acquiescence constitute error and should be reversed.

V. THE DISTRICT COURT PROPERLY ASSERTED JURISDICTION OVER LOUISIANA'S THIRD-PARTY COMPLAINT

Louisiana expressly agrees (La. Br. 38) with Mississippi's identification of the three issues that must be addressed in answering the question about jurisdiction that this Court put to the parties in its order of March 23rd granting certiorari. Louisiana also expressly agrees with Mississippi about the answers to the first two of those issues. Louisiana agrees that the language of 28 U.S.C § 1251(a) does not preclude all other courts from taking jurisdiction of a controversy between two states (La. Br. 38-39), and Louisiana agrees that its intervention and its third-party claim against Mississippi were within the jurisdiction of the district court, both as a matter of federal-question jurisdiction and because of ancillary jurisdiction as applied to intervention of right and to a third-party complaint. (La. Br. 39-40)

Louisiana's position on the third issue is more difficult to fathom. Louisiana says that the district court "lacked power to exercise jurisdiction over land in Louisiana located west of a proper thalweg-boundary" and that "in this case the district court lacked power to exercise jurisdiction over the land in question." (La. Br. 44) At the same time, however, Louisiana says that if a district court erroneously rules in favor of local residents and is reversed on appeal, "the disposition of the extra-territorial land and the proper location of the boundary is a matter for the higher court." (La. Br. 43) It is on this basis that Louisiana concludes by urging that the judgment of the Fifth Circuit, which held that the land in question was

in Louisiana, should be affirmed. (La. Br. 45) If, as Louisiana seems to argue, a district court loses jurisdiction over land if it concludes that the boundary is such that the land is in another state, it is unclear why there should be any difference in result because the decision comes from a higher court. The general proposition announced in *Durfee v. Duke*, 375 U.S. 106, 115 (1963), "that courts of one State are completely without jurisdiction directly to affect title to land in other States," must speak to the entire system of courts. The Nebraska Supreme Court cannot have had power that a Nebraska trial court would not have, and the Fifth Circuit cannot have more jurisdiction than the District Court in the Southern District of Mississippi, whose judgment it is reviewing.⁹

We stand on what we said on this issue in our opening brief. It cannot be the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it. If land is unquestionably in one state, the courts in another state are without jurisdiction to affect the title to that land. But if the issue is whether land is in one state or another and both the states and the private persons with claims to the land are parties to the suit, the court in which the action is pending has jurisdiction to make a final disposition of the matter, whether it finds that the land is in its state or in the other state. The power to decide an issue is the power to decide it either way.

⁹ The result can hardly turn on the fact that the Fifth Circuit includes both Mississippi and Louisiana. If that were a distinguishing factor, there would be one result when the Fifth Circuit was reviewing a decision of a Mississippi district court about an island in the river between Mississippi and Louisiana but a different result if the island in question were between Mississippi and Arkansas.

CONCLUSION

The judgment of the Fifth Circuit should be reversed and judgment should be rendered as prayed for in Mississippi's initial brief.

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